SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 566

STEPHEN J. ROTH, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ETC., APPELLANT,

vs.

PRESTON DELANO, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES OF AMERICA, ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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[fol. a]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN

CALENDAR ENTRIES

1946

June 25. Petition For Declaratory Judgment filed.

June 25. Summons Issued.

June 25. Order To Show Cause—Returnable July 8, 1946 and Temporary Restraining Order filed and entered—Lederle, J.

June 28. Appearance of Joseph T. Connolly filed.

June 28. Stipulation Re Order to Show Cause etc. filed.

June 28. Order Dissolving Restraining Order and Dismissing Order To Show Cause filed and entered—Lederle, J.

July 2. Summons returned and filed.

July 12. Stipulation for extension of time filed.

July 12. Order for Extension of time of Connolly, Rec. to Plead to and including July 31/46 filed and entered—Lederle, J.

July 29. Stipulation for extension of time filed.

July 29. Order for Extension of time of Connolly, Rec. to Plead to and including Aug. 15/46 filed and entered—Lederle, J.

August 13. Special Appearance of Preston Delano, etc. and Motion to Quash Service of Process and to Dismiss Action filed.

August 13. Motion on behalf of Defendant Joseph T. Connolly to Dismiss the Plaintiff's Petition filed.

August 29. Additional Summons Issued.

September 3. Affidavit of R. B. McCandless in support of Motion to Dismiss filed.

September 11. Summon returned and filed.

[fol. b]

1947

May 2. Notice of Hearing on Motion to Dismiss for June 2/47 filed.

May 2. Affidavit of Proof of Mailing filed.

June 9. Order Sub. Pltf. and Atty. for Pltf. filed and entered—Lederle, J.

1947

June 9. Motion to Dismiss heard in part and cont'd to June 23/47 for briefs.

June 23. Motion to Dismiss cont'd to July 14/47 by Consent.

June 23. Defts. granted until July 14/47 for submitting Reply to Pltfs. Reply brief.

July 10. Order of Dismissal and Proof of Mailing filed. Order entered—Lederle, J.

September 4. Order Correcting Docket Entries of June 9 and 23/47 filed and entered—Lederle, J.

September 4. Proof of Mailing filed.

October 2. Notice of Appeal of Pltf. filed.

October 2. Bond on Appeal in $250.00 filed. U. S. Fidelity and Guaranty Co.

October 3. Proof of Mailing filed.

October 9. Designation of Contents of Record on Appeal filed.

October 9. Proof of Service filed.

November 7. Stipulation and Order extending time to file Record on Appeal to Dec. 7/47 filed. Order entered—Lederle, J.

November 7. Stipulation Re Comparison of Record filed.

November 7. Stipulation as to Additional Contents of Record on Appeal filed.

[fol. 1] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

Civil No. 5824

JOHN R. DETHMERS, Attorney General, in the name and on behalf of the People of the State of Michigan, Plaintiff,

vs.

PRESTON DELANO, Comptroller of the Currency of the United States of America, and Joseph T. Connolly, as Receiver of the First National Bank—Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency of the United States of America, Defendants

PETITION FOR DECLARATORY JUDGMENT AND OTHER RELIEF—Filed June 25, 1946

Now comes John R. Dethmers, petitioner, and respectfully represents unto this Honorable Court as follows:

[fol. 2]

I

That he is the Attorney General of the State of Michigan and files this petition in the name of and on behalf of the People of the State of Michigan.

II

That Preston Delano, one of the defendants herein, is the Comptroller of the Currency of the United States of America, and, as such, is vested with supervisory control over all National banks and particularly over his co-defendant, Joseph T. Connolly, both in his capacity as Receiver of the First National Bank-Detroit, a National Banking association and as Detroit Representative of the Comptroller of the Currency of the United States of America.

III

That Joseph T. Connolly, one of the defendants herein, is the Detroit Representative of the Comptroller of the Currency of the United States of America and the present Receiver of the First National Bank-Detroit, a National Banking Association.

IV

That the said First National Bank-Detroit, a National Banking Association, was organized under the laws of the United States of America, with its principal place of business in the City of Detroit, County of Wayne, State of Michigan, in the Eastern District of Michigan, Southern Division; that the said bank did, on February 11, 1933 close its doors at the close of business of said day and did not thereafter resume the conduct of normal banking business; that on March 13, 1933, F. G. Awalt, the Acting Comptroller [fol. 3] of the Currency of the United States, acting under authority of the Act of Congress known as the Bank Conservation Act, having found that said First National Bank-Detroit was unable to transact and carry on its ordinary banking business or exercise its usual banking functions without prejudice to the rights of depositors and other creditors, appointed Paul C. Keyes Conservator thereof; that said Paul C. Keyes, acting under the direction of the Acting Comptroller of the Currency, took possession of all of the books, records and assets of said bank and continued in possession thereof until March 21, 1933, when he resigned; that thereupon the Acting Comptroller of the Currency appointed C. O. Thomas as Conservator and who immediately entered upon the duties of said office and took over from the said Keyes all of the books, records and assets of every description of said First National Bank-Detroit, and remained in exclusive possession and control thereof as such Conservator until May 11, 1933; that on said last mentioned date the Acting Comptroller of the Currency, having found and declared said First National Bank-Detroit to be insolvent and unable to pay its just and legal debts and obligations, appointed C. O. Thomas Receiver of said bank, pursuant to the statutes of the United States in such case made and provided; that thereafter said C. O. Thomas resigned as Receiver of said bank, the said resignation to be effective as of August 15, 1934; that B. C. Schram was appointed by the Comptroller of the Currency to succeed said C. O. Thomas as Receiver of said Bank, said appointment to be effective as of August 15, 1934; and that thereafter said B. C. Schram resigned as Receiver of said bank, the said resignation to be effective as of close of business on June 15, 1944; that Joseph T. Connolly, one of the defendants herein, was appointed by

the Comptroller of the Currency to succeed said B. C. Schram as Receiver of said Bank, said appointment to be effective as of close of business on June 15, 1944; and that [fol. 4] since said date the said defendant has been and now is the duly appointed, qualified and acting Receiver of the First National Bank-Detroit; that the said defendant, Joseph T. Connolly and/or his predecessors, were charged with the duty, under the direction of the Comptroller of the Currency, to collect all debts, dues and claims belonging to said bank; and, as your petitioner is informed and verily believes, did so exercise and discharge their duties in this regard.

V

That your petitioner is informed and verily believes, that the said Joseph T. Connolly, one of the defendants herein, and/or his predecessors in office, while acting in the capacity of Receiver of the First National Bank-Detroit, a National Banking Association, did cause notice to be given to all claimants, creditors and depositors of said insolvent bank, in accordance with the provisions of Section 193, Title 12 U. S. C., by advertisement duly published in qualified newspapers in the City of Detroit, County of Wayne and State of Michigan, calling on all such persons to present their claims, if any they had, and to make legal proof thereof as set forth in the National Bank Act, hereinbefore referred to.

VI

That your petitioner is informed and verily believes, that pursuant to said notice that the majority of the claimants, creditors and depositors of said insolvent bank, did make, present and file proof of claim with said defendant Receiver and/or his predecessors; and that said proofs of claims were duly passed upon, adjudicated and approved as valid claims against said insolvent bank, by said defendant Receiver, and/or his predecessors and by the Comptroller of the Currency of the United States.

[fol. 5] VII

That your petitioner is informed and verily believes, that as assets of said insolvent bank were collected and liquidated by the said defendant Receiver, and/or his predecessors, dividends were declared and made payable to those

said claimants, creditors and depositors who had previously filed proofs of claims and which claims had been approved as hereinbefore set forth, said dividends being the amount and payable on dates as follows:

Dividend No.	Date Payable	Percentage of Claim	
1	April 12, 1933	40%	
2	November 15, 1933	10%	
3	November 30, 1934	20%	
4	May 16, 1938	10%	
5	November 1, 1940	20%	100%
6 (Int.)	December 7, 1942	7.565%	

VIII

That your petitioner is informed and verily believes, that subsequent to the filing of proofs of claim as aforesaid, that said defendant Receiver, and/or his predecessors, did issue dividend checks to the several above mentioned claimants, from time to time as said dividends accrued and were declared; that great numbers of said checks were returned unclaimed, could not be delivered to the persons entitled thereto, or were delivered to the persons entitled thereto but were not presented for payment by such persons, and which said checks or the funds allocated for the payment thereof now remain in the possession and under the control of the said defendant Receiver and the Comptroller of the Currency of the United States of America.

IX

[fol. 6] That by the provisions of Act No. 238, of the Public Acts of the State of Michigan for 1897, and amendments thereto, entitled, "An Act to provide for the discovery by the State Board of Escheats or the Attorney General of escheated and escheatable estates, including abandoned property, and providing the procedure to declare such property escheated to the state, and for the disposition thereof, and declaring the statute of limitations not applicable to such proceedings", being Sections 13455 to 13477 both inclusive, Compiled Laws of Michigan for 1929, and Act No. 170, of the Public Acts of Michigan for the year 1941, it is made the duty of the Attorney General to protect the interests of the state in any unclaimed, uncalled for or abandoned

money, securities, credits or property of any kind, held by or in the possession or control of any person, or persons, as defined in said Act, in the name of or for the use and benefit of any other person, or persons, as defined in said Act; it is further made the duty of each person, within this state, who or which as a depository, as defined in said Act, is indebted or accountable to any other person, as defined in said Act, for money, credits, securities or property of any kind to make a report on the 30th day of June of every year to the State Board of Escheats, said report to contain the names of the persons entitled to said unclaimed, uncalled-for or abandoned money, securities, credits or property of any kind where there have been no dealings with said depository in relation to such unclaimed, uncalled for or abandoned property within a period of seven (7) years or more prior to the date of said Report, together with the amounts and nature of such unclaimed, uncalled for or abandoned property. A copy of said Act is attached hereto, made a part hereof, and marked, "Exhibit A," and to which reference is hereby prayed.

[fol. 7] X

That under the provisions of the said Acts and amendments thereto, as aforesaid, it is made the duty of your petitioner to see that such reports are properly made in the manner and time as hereinbefore provided, and, if the same are not filed as required, it is the further duty of your petitioner to take all proper steps to secure the proper making and filing of the same; the said Act further authorizing your petitioner, if he shall have good reason to believe that a proper disclosure has not been made and that there is property in the custody of said depository which has escheated or is escheatable to the state, upon leave granted therefor, to file a Bill in Chancery in the name and on behalf of the People of the State of Michigan against said depository in any Court having jurisdiction thereof, to compel a full, complete and truthful statement of the matters in said Acts required to be contained in the report aforesaid.

XI

That said Act provides that after a truthful and complete report has been filed by the depository, the Attorney General or the State Public Administrator, where after

examination of said report and investigation relative to the unclaimed, uncalled-for or abandoned property reported, discloses that the persons legally entitled thereto have been unheard of, missing or disappeared for a period of seven (7) years or more, giving rise to a presumption of death, and leaving no known heirs to institute proceedings to administer the unclaimed, uncalled-for or abandoned property as their estate, in accordance with the provisions of said Act.

[fol. 8] XII

That in the said Act, it is further provided that whenever such estate has been fully and completely administered by the Probate Judge having jurisdiction thereof, that it shall be the duty of your petitioner, as Attorney General, to see to it that all such property remaining in said estate after due administration thereof, is turned over to the care and custody of the State Board of Escheats, who shall take the same as Trustee thereof and who, as soon thereafter as possible, shall cover the said property or avails thereof to the State Treasury for the use of the Primary School Fund of the State of Michigan.

XIII

That in said Act it is further provided that whenever there is money, securities, credits or property of any kind that has remained unclaimed, uncalled for, or abandoned, as in said Act provided, for a period of seven (7) years or more, your petitioner, the Attorney General, may in the name of the People of the State of Michigan, institute suit in the Circuit Court in Chancery of the county in which the depository is situated to escheat to the state such unclaimed, uncalled for or abandoned property, or may intervene for such purpose in any suit. That said Circuit Court in Chancery, after due notice being given to all parties in interest as provided in said Act, shall at said hearing upon a finding that such property has been abandoned, decree such property escheated or transferred to the state and direct that the same be paid over or delivered to the State Board of Escheats, to be held by said board as other escheated property.

[fol. 9] XIV

That in said Act, it further provides that if at any time after real estate or personal property is assigned to the people of this state as an escheated estate, or as abandoned property, any person or persons shall file with the State Board of Escheats satisfactory proof, to be determined by said Board of Escheats, of the right of such person or persons, as husband, wife, heir-at-law, next of kin, devisee or legatee under a will, or assigns, to the estate of such disappeared, missing or deceased person, then in that case the State Board of Escheats shall cause such real estate or personal property, or the avails thereof, whenever the same has been sold by the Board of Escheats, upon the payment to the said Board of Escheats by the person or persons so claiming the estate, of all expenses to the state which may have been incurred by the state in relation to such estate, to be turned over to such person or persons, or such part thereof as such person or persons may be lawfully entitled to out of the estate of such disappeared, missing or deceased person.

At any time after any money, securities, credits or property of any kind is assigned to people of this state as an escheated estate or as abandoned property, any assignee or any depositor, other than a depositor who was a natural person, shall file with the State Board of Escheats satisfactory proof to be determined by said Board of Escheats, of the right of such assignee to the money, securities, credits or property of any kind, or the avails thereof, when the same has been sold, to be turned over to the assignee, or such part thereof as such assignee may be legally entitled to out of such escheated or abandoned property.

The depositor presumed to be deceased, or to have abandoned his property, and whose said estate has been admin-
[fol. 10] istered, or whose property has been decreed to have been abandoned, and assigned to the people of the state as an escheated estate, or as abandoned property, may at any time upon presenting to the Board of Escheats, satisfactory proof of his identity and right to such assigned property, receive the property so assigned to the state, or the avails thereof, and in addition thereto shall be paid the amount of administration costs and expenses which have

been charged against and paid out of his estate. Such payments shall be made out of any money in the state treasury which has been derived from escheated estate or abandoned property.

Any depositor, his heirs, legatees, devisees or assigns may have a final decision of the State Board of Escheats under this section reviewed by the Supreme Court by Certiorari.

XV

That in said Act, it further provides that where money, securities or other personal property is paid over or delivered to an administrator, or to the State Board of Escheats, pursuant to said Act, and any depository, as hereinbefore defined in said Act, paying such money or delivering such securities or property is thereafter required to carry out and perform their contract of deposit with the depositor, as hereinbefore defined in said Act, or the heirs, holders for value or assigns of such depositor making such deposit, or the person in whose name such property was held, possessed or controlled, as provided in said Act, the State of Michigan shall indemnify and pay to such depository the amount of damage or loss which they may have sustained, providing satisfactory proof thereof is made to the State Board of Escheats of the State of Michigan, which State Board of Escheats shall allow the amount they find to be due and certify the same to the Auditor [fol. 11] General, who shall thereupon draw his warrant for such amount on the State Treasurer, who shall pay the same out of any money in the state treasury which has been derived from escheated estates or abandoned property.

Any depository, his or its heirs or assigns, may have any final decision of the State Board of Escheats under this section reviewed by the Supreme Court by Certiorari.

XVI

That by said Act, in addition to the making of the annual report therein referred to, it is made the duty of each person, who or which is a depository, as defined in said Act, within sixty (60) days after receiving such demand in writing from the State Board of Escheats, or the Attorney General, to make, sign, swear to, and file or cause to be made, signed, sworn to and filed, a report in form and substance as

provided for in said Act. In case of liquidating or dissolving depositories, the report shall be based and substance shall include all property as provided for in said Act, where no dealings or transactions have been had between the depositor, as defined in said Act, and the depository with respect to such property for a period of seven (7) years or more.

XVII

That in accordance with the aforesaid Act, as amended, on, to wit, the 20th day of June, A. D. 1946, a demand in writing was made upon the said Joseph T. Connoly, one of the defendants herein, Receiver of the First National Bank—Detroit, a national banking association, a true copy of which is attached hereto, made a part hereof, and marked "Exhibit B", and to which reference is hereby prayed, that he furnish a report of all those items and accounts wherein dividend checks were heretofore issued to and in the name [fol. 12] of those persons who had previously filed proofs of claim with the Receiver of the First National Bank—Detroit and which proofs of claim were duly received, passed upon, adjudicated and approved by the said Receiver of the First National Bank—Detroit and by the Comptroller of the Currency of the United States and which said dividend checks were either unclaimed by, or not delivered to, the persons entitled thereto, or which said checks were delivered to the persons entitled thereto but were not subsequently presented for payment thereof, the funds segregated and set apart for the payment of these latter dividend checks remaining, together with the aforesaid unclaimed or undelivered checks, in the possession or under the control of the said Receiver and the Comptroller of the Currency of the United States of America, and concerning which no dealings or transactions have been had between said Receiver and/or the Comptroller of the Currency of the United States of America and the persons entitled thereto and to whom these checks were issued, their heirs, devisees, legatees or assigns, since the time of issuance thereof or for a period of seven years or more last past.

XVIII

That it was the duty of the said defendant Receiver, and/or his predecessors, to make, execute and file with the State Board of Escheats of the State of Michigan, on the 30th day of June of each year, during the pendency of said

Receivership, pursuant to the statutes hereinbefore set forth, the reports as provided for in said statutes, embracing and including all items wherein proofs of claim had been filed, adjudicated and allowed and wherein, based upon such valid proofs of claim, dividend checks were issued thereon, but which checks had remained unclaimed, undelivered, uncalled-for or abandoned, or which checks had been delivered to the persons entitled thereto but which had not been pre-[fol. 13] sented for payment thereof and wherein no dealings or transactions had been had between said defendant Receiver and/or his predecessors and/or the said defendant Comptroller of the Currency of the United States, and/or his predecessors, and the persons entitled thereto, their heirs, devisees, legatees and assigns, respecting said checks and/or the funds segregated and allocated for the payment thereof, for a period of seven years or more subsequent to the date of the issuance of said dividend checks; that said defendant Receiver and/or his predecessors have wholly and utterly neglected and failed to file with the State Board of Escheats of the State of Michigan the reports so required to be filed by said statutes, to the great detriment and irreparable harm and loss to the owners of said dividends, their heirs, legatees, devisees and assigns and to the people of the State of Michigan, and particularly the Primary School System thereof.

XIX

That your petitioner is informed and verily believes, that the said defendant Receiver, pursuant to direction of said defendant Comptroller of the Currency, is about to remove as of the 30th day of June, A. D. 1946, all said unclaimed, uncalled-for, abandoned and undelivered dividend checks, together with the funds for the payment of those checks which had been delivered but not presented for payment, now in their possession and under their control, from out of this jurisdiction and to the offices of the Comptroller of the Currency, Washington 25, D. C., together with the books, records, files, proofs of claim and all other matters or things appertaining or incident thereto; that such removal, if permitted, would be violative of and contrary to the express terms and provisions of the statutes hereinabove enumerated and set forth, for the reason that such action, if permitted, would place the said property, now

[fol. 14] within this jurisdiction and subject to the statutes hereinabove set forth, beyond and outside of the territorial limits of the State of Michigan and beyond the process and outside the jurisdiction of its courts, all to the great and irreparable harm and injury of the owners of said dividends, and their heirs, legatees, devisees and assigns and to the people of the State of Michigan, and particularly the Primary School System thereof.

XX

That your petitioner is informed and verily believes that the liquidation of the said First National Bank—Detroit, a national banking association, has for some time past been completed and that the dividend checks and funds hereinabove described and set forth, represent a separate and distinct segregation of property belonging to the owners, their heirs, devisees, legatees and assigns thereof, based upon the valid proofs of claim heretofore filed with the said defendant Receiver and/or his predecessors, and contractural rights based thereon and in and to which, the State of Michigan and the people thereof under its Escheat Laws hereinabove described and set forth, have an interest.

XXI

That this petition is filed in accordance with the Provisions of Section 13463, Compiled Laws of the State of Michigan for the year 1929, and Section 274-D of the Judicial Code, Section 400, U. S. C.

XXII

That the matter aforesaid is concerned with an actual controversy between the people of the State of Michigan and the defendants herein, and is not concerned with Federal taxes.

[fol. 15] XXIII

And your petitioner further alleges that he is without relief in the premises except in a Court of Equity.

Wherefore, your petitioner respectfully prays:

1. That this Court take jurisdiction of the aforementioned matter and that the within named defendants and each of

them, be required to make full, true and direct answer to the matters herein stated and charged.

2. That a Writ of Summons be issued out of and under the Seal of this Court to each of the defendants herein named.

3. That in accordance with Section 274-D of the Judicial Code, Section 400 U.S.C., this Honorable Court declare as follows:

a. That Act 238 of the Public Acts of Michigan for the year 1897, and amendments thereof, being Sections 13455 to 13477, both inclusive, of the Compiled Laws of Michigan for 1929, as amended by Act 170 of the Public Acts of Michigan for 1941, is applicable to the First National Bank—Detroit, a national banking association, heretofore declared insolvent and since such insolvency liquidated.

b. That the defendants, their successors, attorneys, officers, agents and employees are subject to and bound by the provisions of the foregoing laws.

4. That an Order to Show Cause be issued out of this Honorable Court calling upon the said defendants, their successors, attorneys, officers, agents and employees, to show cause, if any there be, why injunction should not issue in the meantime and during the pendency of the said suit [fol. 16] enjoining said defendants their successors, attorneys, officers, agents and employees from removing or causing to be removed the aforesaid unclaimed, undelivered, uncalled-for or abandoned dividend checks or those funds which were segregated and set apart for the payment of those dividend checks which have heretofore been delivered to the persons entitled thereto but not presented by them for payment thereof, and any and all books, records, files, proofs of claim and allied papers concerning, pertaining or incident thereto, from the jurisdiction of this Court and out of and beyond the territorial limits of the State of Michigan.

5. That a temporary restraining order be allowed by this Honorable Court in the meantime and pending the hearing on the Order to Show Cause, restraining the said defendants, their successors, attorneys, officers, agents and employees, from removing or causing to be removed the aforesaid unclaimed, undelivered, uncalled-for, or abandoned dividend checks or those funds which were segregated and set apart for the payment of those dividend checks

which have heretofore been delivered to the persons entitled thereto but not presented by them for payment thereof, and any and all books, records, files, proofs of claim and allied papers concerning, pertaining or incident thereto, from the jurisdiction of this Court and out of and beyond the territorial limits of the State of Michigan.

6. That your petitioner may have such other and further relief in the premises as to this Court and may seem adequate and just.

And your petitioner will ever pray.

John R. Dethmers.

[fol. 17] *Duly sworn to by John R. Dethmers. Jurat omitted in printing.*

[fol. 18] EXHIBIT "A" TO PETITION

ACT NO. 238, PUBLIC ACTS OF 1897, AND AMENDMENTS THERETO, AS AMENDED BY ACT NO. 170 PUBLIC ACTS OF 1941

Title

An Act to provide for the discovery by the state board of escheats or the attorney general of escheated and escheatable estates, including abandoned property, and providing the procedure to declare such property escheated to the state, and for the disposition thereon, and declaring the statute of limitations not applicable to such proceedings.

13455. Escheated Property: Attorney General to take charge. Sec. 1. The people of the State of Michigan enact, That the Attorney General of this state, shall, as hereinafter provided, take charge of all matters pertaining to lands or other property which may have escheated or which may hereafter escheat to the State by reason of the owners thereof dying intestate and leaving no legal heirs thereto.

13456. Same: Investigation by Attorney General. Sec. 2. It shall be the duty of the Attorney General to make investigations and inquire into every county of this state as to whether there is any property therein belonging to the estate of any deceased person who was, at the time of his death, a resident of any county herein, or who was a non-

resident, but had property in any such county at the time of his death, and who shall have died intestate, leaving no legal heirs, and whose estate under the laws of descent of this state would have become vested in the state; the kind and nature of such property, and the situation and condition thereof.

[fol. 19] 13457. Same: Administration, Procedure: Non-Resident Decedent, Jurisdiction. Sec. 3. Whenever the Attorney General has knowledge of any escheated estate, he shall immediately see that due administration thereof shall be had in the Probate Court of the county of which the deceased person owning such estate was an inhabitant or resident at the time of his death, or, if a non-resident, in a county in which such deceased person had any such estate at the time of his death. If such deceased person, at the time of his death, resided in any other state or country leaving such estate to be administered in this state, administration thereon shall be granted by the Probate Court of any county in which there shall be such estate to be administered, and the administration first legally granted shall extend to all the estate of the deceased in this state, and shall exclude the jurisdiction of the Probate Court of every other county.

13458-1. Same: Appointment of Administrator; Attorney General, Duties; Laws Applicable. Sec. 4. Administration of the estate of any such person dying intestate shall be granted upon the application of the Attorney General to one or more suitable persons. It shall be the duty of the Attorney General to see that such administration is promptly and properly carried on, and he shall represent the state and protect its interests in all matters pertaining to such estates. Such administration shall be in accordance with the general statutes governing the administration of estates of deceased persons, except as herein otherwise expressly provided.

13458-2. Same: Limitation of Administrator's Fees. Sec. 4a. In the administration of the estates of disappeared or missing persons to escheat unclaimed, uncalled for or abandoned money, securities, credits or property of any kind [fol. 20] in the Probate Court, the fees allowed by the Probate Court to the county public administrator shall not exceed a total of more than 15 percent of the cash value of the property handled by them.

13458-3. Definitions. Sec. 4b. The words "person" or "persons" as used in this act shall be understood and interpreted to mean and include a natural person, a co-partnership, a company, an association, a bank, a trust company, a corporation, except municipal corporations, or any officer thereof, any governmental department, agency, instrumentality or official, a depository, a receiver, a trustee, a fiduciary, a debtor, a custodian, a liquidating officer, or any combination of natural persons.

The words "depositor" or "depositors" as used in this act shall be understood and interpreted to mean and include any person, or persons, as above defined, who or which is the legal or equitable owner or creditor entitled to the possession of any property, real, personal or mixed, including liquidated choses in action, which is in the possession or under the control of any other person, as above defined, who or which is indebted or accountable for any such property to such depositor.

The word "deposit" as used in this act shall be understood and interpreted to mean and include money, credits, securities, liquidated choses in action and property of any kind or nature.

The word "depository" as used in this act shall be understood and interpreted to mean and include any person, as above defined, who or which has in his or its possession or under its control any property, real, personal or mixed, including liquidated choses in action, for which he or it is indebted or accountable to any other person as depositor. [fol. 21] The word "escheated" as used in this act shall be understood and interpreted to refer to and include all property of whatever nature, the title to which has accrued and vested in the state by operation of any statute of this state, by reason of there being no known heirs, devisees, legatees or assignees of the last known owner.

The word "escheatable" as used in this act shall be understood to refer to and include all property of whatever kind or nature, including liquidated choses in action, over which the state has power to assume control by appropriate proceedings, by reason of its having lain dormant, unclaimed, uncalled for or abandoned as in this act provided.

13459. State Interest, Protection by Attorney General. Sec. 5. It shall be the duty of the Attorney General to pro

tect the interests of the state in any unclaimed, uncalled for or abandoned money, securities, credits or property of any kind, held by or in the possession or control of any person, or persons, in the name of or for the use and benefit of any other person, or persons, in manner provided for in this act.

13460-1. Same: Report to State Board of Escheats; Contents, Signature, Filing, False Statements, Perjury. Sec. 6. On the thirtieth day of June in every year after the taking effect of this act, it shall be the duty of each person within this state, who or which as a depository is indebted or accountable to any other person for money, credits, securities or property of any kind to make a report as hereinafter provided.

Such report shall be made to the State Board of Escheats and shall contain a truthful statement, in detail of the following matters, viz.:

[fol. 22] First, The name of the depositors, or the name of the person in whose name any such deposit, or deposits, of any kind is held by any such person, or depository, where no dealings or transactions have been had between the depositor and the depository with respect to any money, credits, securities or property of any kind for a period of 7 years or more: provided, however, That notice in writing to the depository by the depositor, his heirs, representatives or assigns, to keep the deposit alive, shall be construed as a transaction within the meaning of this subsection;

Second, The date of such depositor deposits, by the depositor with the depository, or credit or credits by the depository to the depositor and whether they are in money, securities, or other property, and if not in money, the nature of the same;

Third, Any interest due on such deposits, money, securities, credits or other property, if any, and the amount thereof;

Fourth, The sum total of such deposit, deposits, money, securities, credits or other property, together with the interest added thereto;

Fifth, Such report, itemized as aforesaid, shall be signed by the natural person making the same and shall be sworn

to before a natural person competent to administer oaths as a full, complete and truthful statement of each of the items therein contained. If such report is made for and on behalf of a copartnership, company or association, such report may be signed and sworn to by any member of such copartnership, company or association or some person duly authorized who has knowledge of the facts. If such report is made for and on behalf of a corporation, private or municipal, such report shall be signed and sworn to by the [fol. 23] president, vice-president, or treasurer of such corporation, and such signing and swearing to such reports shall appear to be for and on behalf of such corporation.

After the making, signing and swearing to such report as herein provided, the same shall be filed in the office of the State Board of Escheats of the state of Michigan and it shall be the duty of the secretary of said Board of Escheats to endorse or cause to be endorsed thereon the time at which such report was received and filed, which endorsement shall be signed by such secretary or some person legally competent to sign the same, and thereafter such reports shall be and remain a part of the official records of the office of the State Board of Escheats.

If any false statement in such report is signed and wilfully sworn to, it shall be deemed perjury on the part of the person signing and swearing to the same, and such person shall be liable to be proceeded against and punished as in other cases or perjury.

13460-2. Same: Additional Reports on Demand of State Board of Escheats, or the Attorney General, Contents, Examination. Sec. 6a. Upon receiving information or having good reason to believe that any money, credits, securities or property of any kind, has been unclaimed, uncalled for, or abandoned, as provided in sections 9a and 13a hereof, the State Board of Escheats or the Attorney General shall make demand in writing for a report, as provided herein from the person acting as a depository, as hereinabove defined, who or which has in his or its possession or control such unclaimed, uncalled for, or abandoned property.

Within 60 days after receiving such demand in writing from the State Board of Escheats, or the Attorney General, [fol. 24] it shall be the duty of each person receiving such a

demand, who or which is a depository as hereinabove defined, to make, sign, swear to and file, or cause to be made, signed, sworn to and filed, a report in form and substance as provided in section 6 of this act. In case of liquidating or dissolving depositories, the report shall be based on the form provided by section 6, and the substance of the report shall include all property as provided in section 9a of this act, where no dealings or transactions have been had between the depositor and the depository with respect to such property for a period of 7 years or more.

The State Board of Escheats shall examine, or cause to be examined, such reports with respect to any escheated or escheatable property and report the same to the Attorney General or the State Public Administrator, who shall take such action as may be necessary to escheat or have decreed abandoned such escheated, escheatable or abandoned property as shown in such report.

In making such examination the State Board of Escheats or the Attorney General shall have all the powers with respect to examination of the books and records of the depositories making such reports as are provided by the banking laws of this state with respect to examination of banks.

13461. Same: Failure to Make Report, Penalty, Collection. Sec. 7. If any depository, as hereinabove defined, shall, after being required so to do by the State Board of Escheats or the Attorney General, as hereinbefore provided, failed to make, sign, swear to and file, or cause to be made, signed, sworn to and filed such a report in manner, form, substance and time as aforesaid, he, they or it shall become liable to and shall forfeit to the people of the State of Michigan the penal sum of $300.00 for each such failure, and an [fol. 25] additional penal sum of $10.00 for each and every day while such report shall remain unfiled as in this act provided.

Such penal sum or sums may be collected as hereinafter provided by an action in assumpsit or any other proper legal action to collect a debt, brought in the name and on behalf of the people of the State of Michigan in any court having legal jurisdiction thereof, and any judgment rendered therefor and costs of suits may be collected in like

manner as other judgments and costs of suit in such cases in such courts are collected.

13462. Same: Collection of Penalty by Attorney General, Procedure, Disposition, Use. Sec. 8. It shall be the duty of the Attorney General to commence any such actions for the collection of such penal sums as hereinbefore provided and to duly prosecute them to effect. After any judgment for such penal sum or sums is rendered, the amount of such judgment with costs of suit may be paid into court by the judgment debtor against whom the same shall be rendered, or if such judgment and costs are collected by execution, the money collected on such judgment and costs shall be paid into court; and in either case the court or clerk thereof receiving the money on such judgment shall immediately transmit the same or cause the same to be transmitted to the state treasurer of the state, who shall give or cause to be given to such court rendering such judgment and transmitting such money his receipt therefor as such treasurer, which receipt such court or clerk thereof shall file or cause to be filed in his office, and the same shall thereafter remain a part of the official records of such office. Such money so received by the state treasurer shall be placed to the credit of the primary school fund.

[fol. 26] 13463-1. Same: Failure to Report, Duty of State Board of Escheats, and the Attorney General; Suit in Chancery to Compel Report. Sec. 9. It shall be the duty of the said board of escheats to see that such reports are properly made in manner and time as hereinbefore provided; and if the same are not filed in time and manner as hereinbefore provided, to take all proper steps to secure the proper making and filing of the same; and it shall be the duty of the attorney general to promptly prosecute to effect and to collect all such penal forfeitures hereinbefore provided for. In the protection of the interests of the state in such deposits or property of any kind as aforesaid, the attorney general shall have power and it is hereby created his duty in addition to the other means hereinbefore provided, if he shall have good reason to believe that a proper disclosure has not been made by any person as depository in any of the reports in this act provided for, and that there are moneys, securities, credits or property of any kind in their custody

or under their control which has escheated or is escheatable to the state, to apply to the circuit court of the proper county by special motion for leave to file a bill in chancery, and upon due showing and leave granted to file a bill in chancery in the name and on behalf of the people of the State of Michigan as depository in any court having jurisdiction of such suit in chancery, or other proper proceedings to compel a full, complete and truthful statement of the matter in this act required to be contained in the reports aforesaid. In any suit or proceedings in this act provided for to be commenced against any such depository no demand for security for costs shall be entertained by the court before whom such suit or proceeding shall be pending.

13463-2. Same: Depositories in Liquidation, Escheatable or Abandoned Property, Collection. Sec. 9a. When any de- [fol. 27] pository, as hereinbefore defined, operating within this state, whose business is being liquidated or dissolved, shall have, be in possession of or in control of, in any way or manner, of any money, securities, credits or property of any kind belonging to any depositor or depositors for which no claim has been filed or for which no demand has been made within the period during which a claim or demand is by law or by decree required to be filed or made by depositors, or when any depository operating within this state, whose business is being liquidated or dissolved, shall have, be in possession or in control, as aforesaid of any money, securities, credits or property of any kind regarding which the depositor thereof has filed no claim and has had no dealings with such depository and/or with the receiver, custodian or liquidating agent thereof, for a period of 7 years from the date of the last deposit or transaction, such money, securities, credits or property of any kind shall be subject to escheat to the people of the State of Michigan, as other escheated, escheatable or abandoned property, and shall, at the discretion of the attorney general or the state public administrator, be administered as in this act provided, or the attorney general may intervene for and on behalf of the people of the State of Michigan in any pending suit or may institute suit to have such property decreed to have escheated and be escheated to the state.

The attorney general shall have the right and be permitted to file 1 or more claims with the receiver, trustee,

custodian or liquidating agent of such depository, which shall be allowed or disallowed the same as if filed by the depositor, and subject to the same set-offs. Such claim or claims filed by the attorney general shall cover and include all deposits for which no claims have been filed by the depositor or depositors, and may be filed at any time before payment of final dividend. Dividends shall be paid to the [fol. 28] state board of escheats on all claims so filed by the attorney general, and allowed.

13463-3. Same: Suit in Chancery by Attorney General; Collection of Escheatable or Abandoned Property, Procedure. Sec. 9b. Where money, securities, credits or property of any kind has been unclaimed, uncalled for, or abandoned, as set forth in section 13a hereof for a period of 7 years or more by the depositor or owner thereof, the attorney general may, in the name of the people of the State of Michigan, institute suit in the circuit court in chancery to escheat to the state such unclaimed, uncalled for, or abandoned property, or may intervene for such purpose in any suit. The circuit court in chancery of the county in which the depository, having the possession or control of such property, is located or has his or its principal office, shall have complete jurisdiction and full power and authority in the premises. Any depository having possession or control of such property and the depositors or owners of such property shall be made parties defendant in such suit. Any number of depositors or owners and any number of depositories may be joined as parties defendant. Personal service shall be made upon such depositories having possession or control of such unclaimed, uncalled for, or abandoned property, and upon such depositors or owners if they or it be found in the county and if not by publication for 6 successive weeks in a newspaper printed and published in the county and circulating therein. Said court at the hearing of said cause shall, upon a finding that such property has been abandoned, decree such property escheated or transferred to the state and direct that the same be paid over to or delivered to the state board of escheats, to be held by said board as other escheated property.

[fol. 29] 13464-1. Same: Person Missing 7 Years, Administrator; Appointment, Right to Property, Disposition.

Sec. 10. If, by any of such reports in this act provided for, it shall appear, or if in any manner it shall come to the knowledge of the attorney general that a depositor has on deposit with a depository any money, securities, credits or property of any kind, or that there has been deposited or left with any such depository any money, securities, credits or property of any kind, in the name of any depositor whose identity is unknown, and that no dealings or transactions have been had in regard to such property between the depositor and the depository within 7 years from the date of the last deposit made by such depositor, or credit (not including voluntary credits) and that there is good reason to believe that such depositor is dead and that his estate should escheat to the State of Michigan; then, and in that case it shall be the duty of the attorney general or the state public administrator to take proceedings forthwith to have an administrator appointed in the proper probate court to administer upon the estate of such missing depositor as a deceased person and it shall be the duty of the state board of escheats to compel the institution of such proceedings. Such administrator shall be appointed as to person and manner of appointment as is provided for in sections 3 and 4 of this act.

After the appointment of such administrator and upon his giving due and sufficient bonds to be required by the court, he shall have the right and it shall be his duty to demand and receive from any such depository having in its possession or under its control any deposits of money, securities, credits or property of any kind of such missing depositor, as provided in this act, and he shall have all the rights of action to reduce such money, credits, securities or property of any kind to his personal possession and control as administrator as aforesaid, as any other administrator [fol. 30] would have if administering upon the estate of a deceased person.

If there are no known heirs, legatees, devisees or assigns of such missing depositor, upon the allowance of his final report and accounting by the probate court such administrator shall assign all property or funds remaining in such estate to the State Board of Escheats.

13464-2. Same: Persons Missing 7 Years; Proof of Escheat, Administration of Estates, Notices. Sec. 10a. In

case there are no known heirs, legatees, devisees or assigns of a depositor, it shall be sufficient proof for the purposes of escheat under the provisions of this act, when it shall appear from reliable sources and from the books and records of the depository with whom the disappeared or missing depositor has money, securities, credits or property of any kind belonging to or standing in the name of any such disappeared or missing depositor, that such disappeared or missing depositor who has had no dealings or transactions with such depository for a continuous period of 7 years in regard to such property: provided, however, That within 30 days after the granting of administration upon the application by the Attorney General or by the State Public Administrator, notice of the granting of such administration shall be published in the form of similar notices in the administration of the estates of deceased persons: provided further, That notice of the hearing on the final account of the administrator shall be published once each week for 3 weeks consecutively prior to the date of the final hearing for the closing of the estate: provided further, That no other or additional notices or proof or publication shall be required for the purposes of escheat in the probate court under the provisions of this act except as herein provided.

[fol. 31] 13464-3. Same: Combination of Escheated Estates for Administration Purposes, Notices. Sec. 10b. For the purposes of escheat in the probate court under sections 9a, 10, 13 and 13a of this act, it shall be lawful for the Attorney General or the State Public Administrator to apply for administration of more than 1 estate in 1 and the same proceeding: provided, however, That the aggregate value of the known assets of the combined estates shall not exceed the sum of $1,000.00: provided further, That the publication requisite in the course of the administration of escheated estates shall also apply hereunder with the exception, however, that estates combined in accordance with the provisions of this section shall all be listed in the same issues of publication and no separate publication shall be required for the individual estates hereunder combined: provided further, That notices of appointment of an administrator of 2 or more combined estates published in the same issues of the paper, where the appointment of the administrator of such 2 or more combined estates was

made on the same day, may list the names of each combined estate under a proper title and proceeding number, with only 1 notice of appointment immediately following the listing of all the names in the combined estates: provided further, That notices of hearing on the final accounts on 2 or more combined estates published in the same issue of the paper, where the hearings are set for the same day, may list the names in each combined estate under a proper title and proceeding number, with only 1 notice of hearing immediately following the listing of all the names in the combined estates: provided further, That a single surety bond sufficient to cover the aggregate value of the combined estates in each proceeding shall be filed by the administrator: provided further, That in all other respects, and whenever advisable and possible estates hereunder com- [fol. 32] bined shall be treated in a similar manner that individual estates are treated under the provisions of this act.

13465. Same: Administration as to Deposits. Sec. 11. After such money and securities as above provided have been legally reduced to the possession and control of such administrator he shall proceed to administer thereon as is herein provided for the administration of escheated estates, and avails of such money or securities shall in like manner be disposed of as herein provided for the disposal of the avails of escheated estates.

13466. Same: Administration of Other Property. Sec. 12. Such administrator shall also administer upon all the other property belonging to such missing person the same as if such missing person were known to be dead. Such administration, and the disposal of the avails of such property shall be in accordance with the provisions of this act in relation to escheated estates.

13467-1. Same: Presumption of Death; Administration of Estate If Without Heirs. Sec. 13. If any person shall disappear and his whereabouts remain unknown for the space of seven (7) years, and no knowledge of such person can be procured for such space of seven (7) years, he shall be presumed to be dead, and if there are no person or persons found who would be his heir or heirs at law, if he were dead, administration shall be taken upon his estate in accordance with the provisions of this act in relation to

escheated estates, and the avails of such estate shall be disposed of as provided in this act for the disposal of the avails of escheated estates.

13467-2. Same: Presumption of Abandonment; Statute of Limitations Not Defense Against State. Sec. 13a. If [fol. 33] any depositor, as hereinbefore defined, who or which has any money, credits, securities or property of any kind which is in the possession or under the control of any depository, doing business, located or operating within this state, where no dealings or transactions have been had with respect to any such property between such depositor and the depository having possession or control of such property for a period of 7 years or more, such depositor shall be presumed to have abandoned such property, and such property shall escheat to this state.

No statute of limitations of this state shall be a defense to any proceedings or action to escheat, have decreed escheated or abandoned any money, credits, securities or property of any kind to the State of Michigan, or any proceeding or action to secure permission of any such property by the state or anyone acting for and on behalf of the state.

13468. Same: Duties of Prosecuting Attorney as to Estate. Sec. 14. The Attorney General shall have the right to call upon the Prosecuting Attorney of any county wherein any such estate is being administered for his services on any occasion in any matter relating to such estate; and such prosecuting attorney shall render such services whenever required by the attorney general without compensation therefor.

13469. Delivery of Property to State Board of Escheats; Notice to Assessing Officer. Sec. 15. Whenever any such estate has been fully and completely administered by the probate court having jurisdiction thereof, the Attorney General shall see that all the property of whatever name or nature remaining in such estate after due administration thereon is turned over to the care and custody of the State [fol. 34] Board of Escheats and to their successors in office, who shall take the same as trustee thereof and who, as soon thereafter as possible, shall cover such property, or the avails thereof, into the State Treasury for the use of the primary school fund. If any such property consists of real estate, the State Board of Escheats shall send by

registered mail a notice containing a description of the real estate so coming into the possession of the state to the assessing officer of the district in which such real estate is situate, and the same shall be sold and conveyed by said trustees in the manner as hereinafter set forth.

13470. Sale of Realty by Board of Escheats; Notices, Publication, Contents. Sec. 16. Whenever such real estate shall come into the care and custody of said trustees as provided for in the preceding section, the same shall be sold and conveyed by said trustees either by public or private sale as the said trustees shall deem to be the best interests of the state therein: Provided, That the same shall not be sold until a notice of the sale of same shall have been published at least three (3) successive weeks prior to said sale in some newspaper printed and circulated in the county in which the real estate is situate. If there be no newspaper printed and circulated in the county where said real estate is situate, then and in that case said notice shall be published in a newspaper printed and circulated nearest to where said real estate is situated. A notice of sale may also be published in such other manner as said trustees may deem to be for the best interests of the state in said real estate. Upon the sale of any such real estate, the Board of Escheats shall notify by registered mail the assessing officer of the district in which such real estate is situate, of such sale, which notice shall contain a description of the real estate sold, the date of the sale, and the name and address of the purchaser thereof.

[fol. 35] 13471. Same: Time; Purchase by State Employe, Penalty. Sec. 17. Such sale when the same shall be sold at a public sale shall be at a time designated by the state board of escheats between the hour of nine (9) o'clock in the morning and five (5) o'clock in the afternoon of the same day to the highest responsible bidder therefor: Provided, That no person employed by the State of Michigan shall by himself or by his agent or representative, either directly or indirectly, purchase any property so sold by the State Board of Escheats. Any sale so made shall be declared void and the purchaser shall be deemed guilty of a misdemeanor and upon conviction before any court of competent jurisdiction shall be fined not to exceed five hundred (500) dollars or imprisoned for a period not to exceed six (6) months.

13472. Same: Terms of Credit, Security. Sec. 18. On such sale, the said trustees may give such length of credit not exceeding three (3) years, and for not more than three-fourths (¾) of the purchase money, as they shall deem best calculated to produce the highest price, and shall secure the moneys for which credit is given by a bond of the purchaser, and by a mortgage on the real estate sold.

13473. Same: Affidavit as to Notice; Deed. Sec. 19. An affidavit of said trustees, or one (1) of them, or of some other person having knowledge of the fact that notice of such sale was given as provided in this act, shall be made before some officer authorized to administer oaths, and shall be attached to the deed of conveyance given by said trustees on the sale of such real estate. Upon such sale, a deed of said real estate shall be made, executed and delivered to the purchaser or purchasers thereof by said trustees.

13474. Sale of Personality by Board of Escheats. Sec. 20. All personal property coming into the care and custody [fol. 36] of said trustees may be sold and conveyed by them, either by public or private sale, as they shall deem to be to the best interests of the state therein.

13475. Record of Board of Escheats; Contents, Place of Keeping. Sec. 21. Said trustees shall keep a full, true and accurate account of all the property of whatever name or nature, which shall come into their care or custody from such escheated estates; the nature of such property and when received; the time and manner of the disposal thereof, the amount of moneys received therefor, and the time and amount of money covered into the State Treasury on account of such estate, which account shall be kept in the office of the state treasurer and shall become a part of the public records of such office.

13476. Escheated Estate; Recovery from State by Person Presumed Dead or His Heirs; Payment. Sec. 22. If at any time after real estate or personal property is assigned to the people of this state as an escheated estate, or as abandoned property, any person or persons shall file with the state board of escheats satisfactory proof, to be determined by said board of escheats, of the right of such person or persons, as husband, wife, heir-at-law, next of kin, devisee or legatee under a will, or assigns, to the estate of such dis-

appeared, missing or deceased person, then in that case the state board of escheats shall cause such real estate or personal property, or the avails thereof, whenever the same has been sold by the board of escheats, upon the payment to the said board of escheats by the person or persons so claiming the estate, of all expenses to the state which may have been incurred by the state in relation to such estate, to be turned over to such person or persons, or such part thereof as such person or persons may be lawfully entitled to out of the estate of such disappeared, missing or deceased person. [fol. 37] At any time after any money, securities, credits or property of any kind is assigned to people of this state as an escheated estate or as abandoned property, any assignee of any depositor, other than a depositor who was a natural person, shall file with the state board of escheats satisfactory proof, to be determined by said board of escheats, of the right of such assignee to the money, securities, credits or property of any kind which has been escheated or decreed to have been abandoned, then in that case, the state board of escheats shall cause such money, securities, credits or property of any kind, or the avails thereof, when the same has been sold to be turned over to the assignee, or such part thereof as such assignee may be legally entitled to out of such escheated or abandoned property.

The depositor presumed to be deceased, or to have abandoned his property, and whose said estate has been administered, or whose property has been decreed to have been abandoned, and assigned to the people of the state as an escheated estate, or as abandoned property, may at any time upon presenting to the board of escheats, satisfactory proof of his identity and right to such assigned property, receive the property so assigned to the state, or the avails thereof, and in addition thereto shall be paid the amount of administration costs and expenses which have been charged against and paid out of his estate. Such payment shall be made out of any money in the state treasury which has been derived from escheated estates or abandoned property.

Any depositor, his heirs, legatees, devisees or assigns may have a final decision of the state board of escheats under this section reviewed by the supreme court by certiorari.

[fol. 38] 13479. Indemnification of Depository: Proof of Loss, Payment. Sec. 23. Where money, securities or other

personal property is paid over or delivered to an administrator, or to the state board of escheats, pursuant to the preceding sections of this act, and any depository, as hereinbefore defined in this act, paying such money or delivering such securities or property is thereafter required to carry out and perform their contract of deposit with the depositor, as hereinbefore defined in this act, or the heirs, holders for value or assigns of such depositor making such deposit, or the person in whose name such property was held, possessed or controlled, as provided in this act, the State of Michigan shall indemnify and pay to such depository the amount of damage or loss which they may have sustained, providing satisfactory proof thereof is made to the state board of escheats of the State of Michigan, which state board of escheats shall allow the amount they find to be due and certify the same to the auditor general, who shall thereupon draw his warrant for such amount on the state treasurer, who shall pay the same out of any money in the state treasury which has been derived from escheated estates or abandoned property.

Any depository, his or its heirs or assigns, may have any final decision of the state board of escheats under this section reviewed by the supreme court by certiorari.

Severing Clause. Sec. 24. Should any portion or section of this act be held invalid for any reason, such holding shall not be construed as affecting the validity of any remaining portion of such section or of this act, it being the legislative intent that this act shall stand notwithstanding the invalidity of any such portion or section.

[fol. 39] EXHIBIT "B" TO PETITION

MICHIGAN STATE BOARD OF ESCHEATS, LANSING

June 20, 1946.

Mr. Joseph T. Connolly, Receiver,
First National Bank—Detroit,
Detroit 31, Michigan.

Dear Mr. Connolly:

Enclosed find Demand Report of Abandoned or Unclaimed Property with reference to Section 6a of Act 238, Public Acts of 1897, as amended and particularly Act 170, Public Acts of 1941.

The demand for report is to be so worded as to include all those items and accounts wherein dividend checks were heretofore issued to and in the name of those persons who had previously filed proofs of claim with the Receiver of the First National Bank-Detroit and which proofs of claim were duly received, passed upon, adjudicated and approved by the said Receiver of the First National Bank-Detroit and by the Comptroller of the Currency of the United States and which said dividend checks were either unclaimed by, or not delivered to, the persons entitled thereto, or which said checks were delivered to the persons entitled thereto but were not subsequently presented for payment thereof, the funds segregated and set apart for the payment of these latter dividend checks remaining, together with the aforesaid unclaimed or undelivered checks, in the possession or under the control of the said Receiver and the Comptroller of the Currency of the United States of America, and concerning which no dealings or transactions have been had between said Receiver and/or the Comptroller of the [fol. 40] Currency of the United States of America and the persons entitled thereto and to whom these checks were issued, their heirs, devisees, legatees or assigns, since the time of issuance thereof or for a period of seven years last past.

The demand report must be prepared in duplicate, signed and sworn to on the reverse side.

Very truly yours, Michigan State Board of Escheats
(Signed) John Gafner, Assistant Secretary.

JG:mf. Registered Mail. Return Receipt Requested. Encl's.

[fol. 41] Annual Report of Unclaimed or Abandoned Property

Name

Address

City ,

To State Board of Escheats, Lansing, Michigan:

The following schedule contains a full, true and complete statement and report of all abandoned or unclaimed property (other than demand bank deposit balances) now in the possession or under the control of the undersigned, or for which the undersigned is accountable to another under special contract or agreement with the owner, and concerning which property or account there has been no dealing or activity on the part of such owner or depositor for a period of seven years or more next preceding the date of this report. This report is made and filed pursuant to the provisions of Act No. 238, P. A. of Michigan for the year 1897, as amended.

Report as of the close of business on , 194 .

SCHEDULE B (for use by persons, co-partnerships, associations and corporations, including banks, in reporting abandoned or unclaimed property other than demand bank deposits.)

Item No.	Name and Last Known Address of Owner or Depositor	Description of Property	Date of Last Activity	Estimated Value

(Signature)

By

(Official Title)

Dated , 194

[fol. 42] STATE OF MICHIGAN
County of —— ss:

——, being duly sworn, says that he is ——, (Official Title) of ——, (Name of Depository) a —— corporation, named in the foregoing report, that such report is true of his own knowledge, and that he signed the same for and in behalf of said depository, he being duly authorized so to do.

Subscribed and sworn to before me this — day of —— A.D. 194—.
——, Notary Public, —County, Michigan.

My commission expires —— —, ——.

EXPLANATION:

"Abandoned property" means property of whatsoever kind or description, tangible or intangible, in the possession or under the control of the party reporting, or for which he or it is indebted or accountable, and for which the owner has made no claim or demand, or concerning which there has been no dealing or transaction on the part of the owner, for a period of seven years or more next preceding the date of the report. Such property includes money, securities, credits, bills of exchange, deposited contents of a safe-deposit box or other receptacle for safe keeping, unclaimed either before or after removal therefrom, accounts for unclaimed wages or salaries or other compensation, and all other choses-in-action, debt or obligation, howsoever evidenced.

"Last Activity" means the date of the last activity or transaction by a depositor or owner in relation to the item of account reported.

If any item in this report has been previously reported, please so indicate.

Mail report to: State Board of Escheats, Lansing 3, Michigan.

File No. —

—— —— (Name), —— —— County, —— —— State. P. O. Address: —— ——.

Annual Report

Year 19— Amount $——

Office of State Board of Escheats Received and Filed

194

Referred to State Public Administrator

194

[fol. 43] In United States District Court

Order to Show Cause and Temporary Restraining Order — Filed June 25, 1946

At a session of the said Court held at the Federal Building, in the City of Detroit, County of Wayne, Michigan, on this 25th day of June, A. D., 1946.

Present: Honorable Arthur F. Lederle, District Judge.

Upon reading and filing of the Petition for Declaratory Judgment and Other Relief herein, and

On Motion of John R. Dethmers, Attorney General of the State of Michigan, Archie C. Fraser, State Public Administrator and Assistant Attorney General and Percival R. Piper, Assistant Attorney General, Attorneys for the Plaintiff herein,

It is ordered, that the defendants herein, Preston Delano, Comptroller of the Currency of the United States of America, and Joseph T. Connolly, as Receiver of the First National Bank-Detroit, a National Banking Association, and as the Detroit Representative of the Comptroller of the Currency of the United States of America, appear before this Court on the 8th day of July, A. D., 1946, and show cause why an Injunction should not issue enjoining them, their successors, attorneys, agents, servants, officers and employees, from removing or causing to be removed from the jurisdiction of this court and out of and beyond the territorial limits of the State of Michigan, any unclaimed, undelivered, uncalled-for or abandoned dividend checks, [fol. 44] now in their possession or under their control, which said dividend checks have heretofore been issued upon proofs of claim heretofore filed with the said defendants, and/or their predecessors, by former creditors, depositors and claimants of the First National Bank-Detroit, a National Banking Association, and accepted, adjudicated and allowed by said defendants, and/or their predecessors, together with any or all funds now in their possession or under their control, which were segregated and allocated for the payment of such dividend checks, said dividend checks and funds representing dividends heretofore declared by said defendants and/or their predecessors, together with any and all books, records, files, proofs of

claim and allied papers concerning, pertaining or incident thereto, pending hearing and final disposition of the interest and rights of the State of Michigan in and to said unclaimed, uncalled-for or abandoned dividend checks or funds.

It is further ordered, that pending hearing and disposion of the Order To Show Cause, the said defendants, their successors, attorneys, agents, servants, officers and employees be, and they are hereby restrained from removing or causing to be removed from the jurisdiction of this court and out of and beyond the territorial limits of the State of Michigan, any unclaimed, undelivered, uncalled-for or abandoned dividend checks, now in their possession or under their control, which said dividend checks have heretofore been issued upon proofs of claim heretofore filed with the said defendants, and/or their predecessors, by former creditors, depositors and claimants of the First National Bank-Detroit, a National Banking Association, and accepted, adjudicated and allowed by said defendants, and/or their predecessors, together with any or all funds now in their possession or under their control, which were segregated and allocated for the payment of such dividend [fol. 45] checks, said dividend checks and funds representing dividends heretofore declared by said defendants and/or their predecessors, together with any and all books, records, files, proofs of claim and allied papers concerning, pertaining or incident thereto.

It is further ordered, that nothing herein shall be construed as preventing or precluding the said defendants or their successors, agents, servants, officers and employees from delivering any unclaimed, uncalled-for or abandoned dividend checks now in their possession or under their control to any person entitled to the same upon receipt of satisfactory proof of right thereto, pending hearing and final disposition of Order to Show Cause, nor shall it prevent or preclude the said defendants or their successors, agents, servants, officers and employees from honoring and cashing any dividend checks heretofore or hereafter delivered to any person entitled thereto, pending hearing and final disposition of this Order to Show Cause.

Arthur F. Lederle, District Judge.

[fol. 46] IN UNITED STATES DISTRICT COURT

APPEARANCE OF DEFENDANT, JOSEPH T. CONNOLLY—Filed June 28, 1946

To the Clerk of the Court:

Please enter the appearance of Joseph T. Connolly, as Receiver of the First National Bank-Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency of the United States of America, defendant in the above entitled cause, by Robert S. Marx, Lawrence I. Levi and Orville J. Thill, as his attorneys.

Robert S. Marx, Lawrence I. Levi and Orville J. Thill, by Lawrence I. Levi, Attorneys for Joseph T. Connolly, Defendant.

[fol. 47] To John R. Dethmers, Attorney General, Archie C. Fraser, Assistant Attorney General and State Public Administrator, Attorney for Plaintiff, Capitol Building, 102 South Walnut Street, Lansing (2), Michigan. Percival R. Piper, Assistant Attorney General, Attorney for Plaintiff, Cadillac Square Building, Detroit (26), Michigan.

You will please take notice that we have this day caused the appearance of defendant, Joseph T. Connolly, as Receiver of the First National Bank-Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency of the United States of America, to be entered in the above entitled cause by Robert S. Marx, Lawrence I. Levi and Orville J. Thill, as his attorneys.

Robert S. Marx, Lawrence I. Levi and Orville J. Thill, by Lawrence I. Levi, Attorneys for Defendant, Joseph T. Connolly, 2443 National Bank Building, Detroit 26, Michigan. Cherry-6075.

Dated: June 28, 1946.

[fol. 48] IN UNITED STATES DISTRICT COURT

STIPULATION RE ORDER TO SHOW CAUSE ETC.—Filed June 28, 1946

It is hereby stipulated, on this 26th day of June, A. D., 1946, at Lansing, Michigan, by and between plaintiff, John R. Dethmers, Attorney General, in the name and on behalf of the people of the State of Michigan, and one of the defendants, Joseph T. Connolly, as Receiver of the First National Bank-Detroit, a National Banking Association, and as Detroit representative of the Comptroller of the Currency of the United States of America, by and through their respective counsel, as follows:

That whereas, the Receivership of the First National Bank-Detroit, a National Banking Association, has been terminated and its offices and all books, records, files and appurtenances incident and relating thereto are about to be removed from Detroit, Michigan, to Washington, D. C., and the subject matter of the within cause is included and co-mingled therein, and to attempt to separate and segregate the latter from all of the said books, records and files would unduly delay and interfere with such orderly removal of said offices and work a hardship upon said Receiver, his agents, servants and employees, therefore,

I

It is agreed that the defendant Connolly may proceed with the closing of his offices in Detroit, Michigan as Receiver of the First National Bank-Detroit, a National Banking Association, and his offices as Detroit representative of the Comptroller of the Currency of the United States of America and that he may likewise proceed with the shipping of all of the records now in his possession in Detroit as such Receiver and such Detroit representative, to the [fol. 49] United States Treasury Department in Washington, D. C., there to be delivered to the custodian of the National Archives of the United States where such records will be preserved and maintained.

II

It is further understood and agreed that the defendant or his successor in office will, pursuant to the order of this court, return to this jurisdiction, during the pendency of the within cause, any or all of the records so removed from this jurisdiction as are requested in said court order and it is further agreed that the defendant will raise no jurisdictional issue or controversy in the within cause because of the fact that said records above referred to are not within this jurisdiction.

III

It is further understood and agreed that there are presently six commercial deposit accounts maintained in the National Bank of Detroit, Detroit, Michigan, which are known as "Comptroller of the Currency for the benefit of the creditors of the First National Bank-Detroit, dividend account numbers 1, 2, 3, 4, 5 and 6." It is further agreed that none of the funds in any of said six accounts will be withdrawn by the Comptroller of the Curreney, or the defendant Connolly or his sucessor in office, pending the final determination or disposition of the within cause, except as described in the immediately following paragraphs.

IV

It is further understood and agreed that during the pendency of this litigation the National Bank of Detroit may honor all issued and outstanding dividend checks [fol. 50] drawn on any of the above described deposit accounts, when properly presented for payment to it, and that further, during the pendency of this litigation, the Comptroller of the Currency may draw on said deposit accounts, or may deliver dividend checks drawn on said accounts, to such persons as may present themselves with satisfactory proof of their being entitled thereto.

V

It is further understood and agreed that upon the filing of this stipulation in the within court and cause, an order may be presented to this court providing for the dissolution of the temporary restraining order heretofore issued

herein on June 25, 1946 and further dismissing the Order to Show Cause issued by said court on the same day.

VI

It is further understood and agreed that this stipulation shall not affect the status quo of, and is without prejudice to, the rights of either party hereto.

John R. Dethmers, Attorney General, by Archie C. Fraser, Assistant Attorney General, State Public Administrator for the Plaintiff. Robert S. Marx, Lawrence I. Levi and Orville J. Thill, Attorneys for Defendant Connolly, by Lawrence I. Levi.

[fol. 51] In United States District Court

Order Dissolving Restraining Order and Dismissing Order to Show Cause—Filed June 28, 1946

At a session of said Court held in the Federal Building, in the City of Detroit, State of Michigan, on this 28th day of June, A.D., 1946.

Present: Honorable Arthur F. Lederle, District Judge.

This matter coming on to be heard upon a written stipulation this day filed with this Court and entered into by and between the plaintiff herein and the defendant, Joseph T. Connolly, which stipulation is incorporated herein by reference, and the Court being fully advised in the premises;

It is hereby Ordered that the defendant, Joseph T. Connolly, may forthwith proceed with the closing of his offices in Detroit, Michigan, as Receiver of the First National Bank-Detroit, a National Banking Association, and his offices as Detroit Representative of the Comptroller of the Currency of the United States; and

It is further Ordered that he may likewise proceed with the shipping of all of the records now in his possession in Detroit as such Receiver and as such Detroit Representative, to the United States Treasury Department in Washington, D. C., some of which records are to be delivered to the custodian of the National Archives of the United States. It is specifically understood that included among such books

and records are the proofs of claims, unclaimed dividend checks, signature cards, and similar data which form the [fol. 52] subject matter of the within controversy.

It is further Ordered that said books and records above referred to, including said proofs of claims, dividend checks, signature cards, etc., shall, during the pendency of the within litigation, be subject to being returned to this jurisdiction by the defendant Connolly, or his successor in office, for the purposes of the within cause pursuant to the further order of this Court.

It is further Ordered that the temporary restraining order heretofore issued herein on June 25, 1946, be and the same is hereby dissolved; and

It is further Ordered that the order to show cause issued by this Court on the same day and returnable on the 8th day of July 1946, be and the same is hereby dismissed, without costs to either party.

Arthur F. Lederle, District Judge.

[fol. 53] In United States District Court

Summons—Filed July 2, 1946

To the above named Defendant:

You are hereby summoned and required to serve upon John R. Dethmers plaintiff's attorney, whose address Capitol Bldg., Lansing 2, Michigan an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

George M. Read, Clerk of the Court. By John J. Ginther, Deputy Clerk. [Seal of Court].

Date: June 25, 1946.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 54] No.

DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

JOHN R. DETHMERS, Attorney General, in the name and on behalf of the People of the State of Michigan, Plaintiff

v.

PRESTON DELANO, Comptroller of the Currency of the United States of America, and JOSEPH T. CONNOLLY, as Receiver of the First National Bank—Detroit, A Nat'l Banking Assn, etc., Defendants

SUMMONS IN CIVIL ACTION

Returnable not later than 20 days after service.

John R. Dethmers, Attorney General, State of Michigan; Archie C. Fraser, State Public Adm. & Assistant Attorney General; Percival R. Piper, Assistant Attorney General, Attorney for Plaintiff.

[fol. 55] RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the — day of —— 19—, I received the within summons:

Marshal's Fees: Travel $——, Service ——, total ——. —— —— United States Marshal. By —— ——, Deputy United States Marshal.

Subscribed and sworn to before me, a —— —— this — day of ——, 19—. [Seal].

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

[fol. 56] RETURN ON SERVICE

File No. 5824

UNITED STATES OF AMERICA,

Eastern District of Michigan, ss:

I hereby certify and return that on the 25th day of June, 1946, I served the annexed summons and Order to Show Cause and the complaint filed in this cause on Joseph T. Connolly, Receiver First National Bank-Detroit by handing to and leaving a copy of the summons and copy of said complaint with him personally at Detroit, Mich. in said District.

John J. Bare, U. S. Marshal, By: Sam O'Connell, Deputy.

Form 1—To be used for Personal Service.

[fol. 57] RETURN ON SERVICE

File No. 5824.

UNITED STATES OF AMERICA,

Eastern District of Michigan, ss:

I hereby certify and return that on the 25th day of June, 1946, I served the annexed summons and Order to Show Cause and the complaint filed in this cause on Preston Delano, Comptroller of the Currency of the United States of America by mailing a copy of the summons and copy of said complaint with Comptroller of Currency, Washington, D. C. by registered mail, in said district.

John J. Bare, U. S. Marshal, by: Sam O'Connell, Deputy.

Form 1—To be used for Personal Service.

[fol. 58] IN UNITED STATES DISTRICT COURT

STIPULATION FOR EXTENSION OF TIME OF CONNOLLY, RECEIVER, TO PLEAD—Filed July 12, 1946

It is stipulated and agreed by and between the plaintiff and defendant Joseph T. Connolly, as Receiver of the First National Bank Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency

of the United States of America, by their respective counsel, that the time within which said defendant Joseph T. Connolly, as Receiver of the First National Bank Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency of the United States of America, may plead, by motion, answer, or otherwise, to the petition for declaratory judgment, filed herein, may be extended to and including the 31st day of July, 1946.

John R. Dethmers, Attorney General, by Archie C. Fraser, Assistant Attorney General, State Public Administrator, for the Plaintiff; Robert S. Marx, Lawrence I. Levi and Orville J. Thill, by Lawrence I. Levi, Attorneys for Defendant, Joseph T. Connolly, 2443 National Bank Building, Detroit 26, Michigan, Cherry—6075.

Dated this 11th day of July, 1946.

[fol. 59] IN UNITED STATES DISTRICT COURT

ORDER FOR EXTENSION OF TIME OF CONNOLLY, RECEIVER, TO PLEAD—Filed July 12, 1946

At a session of said Court held in the Federal Building, in the City of Detroit, State of Michigan, on this 12th day of July, A. D., 1946.

Present: Honorable Arthur F. Lederle, District Judge.

On reading and filing the stipulation by and between plaintiff and defendant Joseph T. Connolly, as Receiver of the First National Bank Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency of the United States of America, by their respective counsel, for an extension of time within which said defendant Joseph T. Connolly, as Receiver of the First National Bank Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency of the United States of America, may plead to the petition for declaratory judgment filed herein, and the Court being advised in the premises,

It is hereby ordered that the time within which defendant Joseph T. Connolly, as Receiver of the First National Bank Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency of the United

States of America, may plead, by motion, answer, or otherwise, to the petition for declaratory judgment filed herein, may be, and the same hereby is, extended to and including the 31st day of July, 1946.

Arthur F. Lederle, District Judge.

[fol. 60] In United States District Court

Stipulation for Extension of Time of Connolly, Receiver, to Plead—Filed July 29, 1946

It is stipulated and agreed by and between the plaintiff and defendant Joseph T. Connolly, as Receiver of the First National Bank-Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency of the United States of America, by their respective counsel, that the time within which said defendant Joseph T. Connolly, as Receiver of the First National Bank-Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency of the United States of America, may plead, by motion, answer, or otherwise, to the petition for declaratory judgment, filed herein, may be further extended to and including the 15th day of August, 1946.

Dated at Detroit, Michigan, this 23rd day of July, 1946.

John R. Dethmers, Attorney General, by Archie C. Fraser, Assistant Attorney General, State Public Administrator, For the Plaintiff; Robert S. Marx, Lawrence I. Levi and Orville J. Thill, by Orville J. Thill, Attorneys for Defendant, Joseph T. Connolly, 2443 National Bank Building, Detroit 26, Michigan, Cherry—6075.

[fol. 61] IN UNITED STATES DISTRICT COURT

ORDER FOR EXTENTION OF TIME OF CONNOLLY, RECEIVER, TO PLEAD—Filed July 29, 1946

At a session of said Court held in the Federal Building, in the City of Detroit, State of Michigan, on this 29th day of July, A. D., 1946.

Present: Honorable Arthur F. Lederle, District Judge.

On reading and filing the stipulation by and between plaintiff and defendant Joseph T. Connolly, as Receiver of the First National Bank-Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency of the United States of America, by their respective counsel, for an extension of time within which said defendant Joseph T. Connolly, as Receiver of the First National Bank-Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency of the United States of America, may plead to the petition for declaratory judgment filed herein, and the Court being advised in the premises,

It is hereby ordered that the time within which defendant Joseph T. Connolly, as Receiver of the First National Bank-Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency of the United States of America, may plead, by motion, answer, or otherwise, to the petition for declaratory judgment filed herein, may be, and the same hereby is, further extended to and including the 15th day of August, 1946.

Arthur F. Lederle, District Judge.

[fol. 62] IN UNITED STATES DISTRICT COURT

SPECIAL APPEARANCE OF PRESTON DELANO, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES OF AMERICA, AND MOTION TO QUASH SERVICE OF PROCESS AND TO DISMISS ACTION—Filed August 13, 1946

Preston Delano, Comptroller of the Currency of the United States of America, claiming that this Court has acquired no jurisdiction over his person as a defendant in this action, hereby appears specially by his attorneys for the

purpose of objecting to the exercise of any such jurisdiction herein by this Court, and appears for no other purpose whatsoever;

Wherefore, so specially appearing, said Preston Delano, Comptroller of the Currency of the United States of America, by his attorneys, moves to quash the alleged service of the summons and copy of the complaint attempted to be made upon him in this action, and for a dismissal as to him of this above entitled action for want of jurisdiction of this Court, for the following reasons, to wit:

1. That, as Comptroller of the Currency, said Preston Delano is an inhabitant and resident of and has his offices in the District of Columbia, all outside the Eastern District of Michigan.

2. That, without his consent, this said action cannot properly be instituted or maintained against the said Preston Delano, as Comptroller of the Currency, outside said District of Columbia; and that any attempt of plaintiff to institute or maintain this said action in this Court against said Preston Delano, Comptroller of the Currency, is contrary to the provisions of the Statutes of the United States [fol. 63] in such cases made and provided, particularly Section 51 of the Judicial Code of the United States (28 U.S.C.A., Sec. 112), and is entirely without authority of law.

3. That no service of process has been made in this action upon said Preston Delano, Comptroller of the Currency, within the Eastern District of Michigan.

4. Further, that the manner in which the alleged service of process herein has been attempted to be made on said Preston Delano, Comptroller of the Currency, is not in conformity with the Court Rules and Statutes of the United States and, in particular, Rule 4 of the Federal Rules of Civil Procedure, and is entirely without authority of law.

This motion is based on the files and records in this action.

Robert S. Marx, Lawrence I. Levi and Frank M. Wiseman, by Frank M. Wiseman, Appearing specially as attorneys for Preston Delano, Comptroller of the Currency, for the purpose of the above Motion only, 2443 National Bank Building, Detroit 26, Michigan, Cherry 6075.

Dated: August 13, 1946.

[fol. 64] IN UNITED STATES DISTRICT COURT

MOTION ON BEHALF OF THE DEFENDANT, JOSEPH T. CONNOLLY TO DISMISS THE PLAINTIFF'S PETITION — Filed August 13, 1946

Now comes Joseph T. Connolly as Receiver of the First National Bank-Detroit, a national banking association, and as Detroit representative, Comptroller of the Currency of the United States, one of the defendants herein, by his attorney, and moves to dismiss the plaintiff's petition for the following reasons:

1. Because the plaintiff's petition reveals that this Honorable Court lacks jurisdiction over the subject-matter of the within controversy.

2. Because the petition reveals that the plaintiff has failed to state a cause of action against this moving defendant.

3. Because the plaintiff's petition reveals that prior to the filing of the within suit this moving defendant and his predecessor receivers in office had completed the liquidation of all of the assets of the receivership of the First National Bank-Detroit and had paid over all moneys so made to the Comptroller of the Currency of the United States in compliance with the provisions of the National Banking Act and particularly Section 192, Title 12, U.S.C.

4. Because under the provisions of the National Banking Act and particularly Sections 192, 193 and 194, Title 12, U.S.C., this moving defendant has no control over funds so turned over to the Comptroller of the Currency of the United States under the provisions of said National Banking Act and has no power or authority with respect to the distribution of said moneys so turned over to the Comptroller of the Currency, the issuance of dividend checks [fol. 65] drawn against said funds or the making and filing of any reports with respect thereto as demanded by the plaintiff herein, all of which is specifically delegated to the Comptroller of the Currency by the National Banking Act as aforesaid.

5. Because this moving defendant, although named in the within suit as both receiver of the First National Bank-Detroit and as the Detroit representative of the Comptroller of the Currency, is not a validly or properly ap-

pointed or authorized agent or representative of the Comptroller of the Currency, the only duly authorized agents for the Comptroller of the Currency being the Deputy Comptroller, the Assistant Deputy Comptroller, and the Third Deputy Comptroller of the Currency as provided for in the National Banking Act, particularly Sections 4, 5 and 6, of Title 12, U.S.C., all three of which are located in the Bureau of the Comptroller of the Currency of the United States in Washington, D. C.

Wherefore, this moving defendant prays that this Court dismiss the plaintiff's petition insofar as this defendant is concerned.

Joseph T. Connolly, as Receiver of the First National Bank-Detroit and as Detroit Representative of the Comptroller of the Currency of the United States, by Robert S. Marx, Orville J. Thill, Lawrence I. Levi and Frank M. Wiseman, by Lawrence I. Levi, 2443 National Bank Building, Detroit 26, Michigan, His Attorneys.

[fol. 66] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF R. B. McCANDLESS IN SUPPORT OF MOTION TO DISMISS—Filed September 3, 1946

DISTRICT OF COLUMBIA, ss:

R. B. McCandless, being duly cautioned and sworn, deposes and says:

That he is the present duly qualified, appointed and acting Deputy Comptroller of the Currency of the United States, and that he has been such since July 7, 1941; that as such Deputy Comptroller of the Currency of the United States he is in direct charge of the Division of Insolvent National Banks and Insolvent National Bank Receiverships, including that of the First National Bank-Detroit.

That the First National Bank-Detroit suspended operations on February 11, 1933, and never thereafter reopened for the conduct of normal banking business. A Conservator was placed in charge of the Bank on March 13, 1933, and on May 11, 1933, the Comptroller of the Currency having been satisfied that the Bank could not be reopened appointed a Receiver therefor, and took possession of the

books and assets of the Bank pursuant to the provisions of the National Banking Act.

A total of 544,630 claims were proven, aggregating $333,173,379.40. The number of claimants was later reduced to 160,271 by the acquisition of a large group of small claims by a comparatively small group of large depositors.

Prior to the appointment of the Conservator, one distribution of five per cent (5%) was made available to creditors and depositors of the Bank by the directors of the Bank [fol. 67] during the State Banking Holiday. A second distribution of five per cent (5%) was made by the Conservator prior to the appointment of the Receiver. Both distributions were in the nature of releases of impounded balances and specific checks were not issued and delivered to creditors or depositors.

At this point and on or about April 12, 1933, the funds accumulating in the hands of the Conservator, which were kept in an account in the Detroit Branch of the Federal Reserve Bank, were augmented by a loan from the Reconstruction Finance Corporation, and a third general release to creditors was authorized of thirty per cent (30%) of balances on deposit.

The Comptroller recognized the emergency confronting the citizens of the City of Detroit. There was neither time nor clerical force to permit the usual process of proofs of claim, the registering of these claims, and the preparation and delivery of dividend checks. Consequently on this occasion, the Comptroller permitted the issuance of Conservator's checks for the thirty per cent (30%) release.

Not until after the Receiver was appointed for the Bank on May 11, 1933, did the process of proving claims begin, and in that process the ratability of the three previous releases was established or adjusted.

The very large number of claims and the immense clerical task presented a problem far beyond the facilities of the Comptroller's office space and clerical force. The emergency in Detroit demanded that special measures be contrived to expedite payments to the public.

The Comptroller of the Currency thereupon in this special instance delegated to the Receiver of the Bank, the power [fol. 68] to effect authorized dividend distributions. Funds were transferred by the Comptroller of the Currency to special dividend accounts subject to the check, for dividend purposes only, of the Receiver. The dividends, paid by

prior release, or effected in that manner by Receiver's checks, were as follows:

1st Div.	5%	February 16, 1933
	5%	March 20, 1933
	30%	April 12, 1933
2nd Div.	10%	November 15, 1933
3rd Div.	20%	November 30, 1934
4th Div.	10%	May 16, 1938
	80%	

After the above distributions were made, it was determined by the Comptroller of the Currency that the problem had been reduced to such proportions as would then permit his regular dividend procedure to be followed. The change in method was made effective at the time of the payment of the fifth dividend on November 1, 1940, which was for the remaining twenty per cent (20%) of the principal balances on deposit. Consequently, all checks for the fifth dividend were drawn by the Comptroller of the Currency.

On May 29, 1944, all the bank accounts that had been maintained subject to the check of the Receiver were closed, and all outstanding Receiver's checks covering the first four dividends were cancelled. The balances so closed out covered the aggregate of the checks still in the hands of the Receiver and undelivered; and, in addition, the total of the checks previously delivered by the Receiver but not presented at the bank for the payment thereof.

[fol. 69] Provision for each class was made as follows:

Payment was stopped on all checks delivered but unpresented and an equivalent sum of money was transferred to the Comptroller in Washington, who placed it in his Washington depositary bank under a pledge of collateral. Thereafter when checks are presented to the former Detroit depositary, they are forwarded to the Comptroller of the Currency for collection, and his new check, bearing his signature, drawn upon his Washington bank, payable to the original claimant, or his assignee, is forwarded in payment thereof.

All undelivered checks in the possession of the Receiver were voided. The aggregate amount of these voided checks

was transferred from the accounts maintained for the Receiver to new accounts which were opened in the National Bank of Detroit in the name of "Comptroller of the Currency, for the benefit of the Creditors of the First National Bank-Detroit, First Dividend", with similar accounts for the "Second Dividend", "Third Dividend", and "Fourth Dividend", the initial deposit in each such account being the aggregate of voided checks of the respective dividends. New checks were prepared payable to the original claimant, executed by the Comptroller of the Currency, drawn against these new accounts, and were entrusted to the Receiver for delivery as called for by creditors.

As stated above, the fifth dividend of twenty per cent (20%) was paid November 1, 1940. This dividend was paid by checks bearing the signature of the Comptroller, drawn against an account in the National Bank of Detroit entitled "Comptroller of the Currency, for the benefit of the Creditors of the First National Bank-Detroit." As it was impractical to attempt to review and sign the checks in the Comptroller's Washington office, the Comptroller dispatched [fol. 70] to Detroit a small group, who supervised the preparation of the dividend, reviewed the computation, and affixed the Comptroller's signature to the dividend checks. When thus completed they were handed over to the Receiver, as customary, for delivery to creditors against their receipt. At the termination of the receivership the undelivered checks in this distribution were returned to the Comptroller for such further effort to complete delivery as his organization could make.

The remaining assets of the receivership were sold under order of court dated September 16, 1942, and the proceeds were used to pay a sixth (or interest) dividend of 7.565%. The number of creditors entitled to receive the dividend had been still further reduced by sale and assignment of claims to the First Liquidating Corporation. These sixth dividend checks were audited and completed by the Comptroller's signature, by a similar process, a group of employees being sent out from Washington to represent the Comptroller and act for him. The checks were drawn against an identical account set up in the National Bank of Detroit in the name of the Comptroller, for the benefit of creditors, etc., Sixth (interest) Dividend.

The Receiver continued in charge of the receivership from the effective date of the sixth and final dividend until June

15, 1944. During that time a continuous effort to deliver all dividend checks was made. It eventually was determined to close the receivership. This was done June 15, 1944, and the final accounting of Receiver B. C. Schram was received and approved, and the receivership was deemed technically closed.

The closing of a receivership involves the reception in the Washington office of certain records and incomplete work. The original executed vouchers, representing all ex- [fol. 71] penses of administering the receiverships, are forwarded to the Comptroller, as are all proofs of claim, receiver's certificates, paid and cancelled dividend checks and the receipts given for the same, and many other records. The very large volume of these records was beyond any storage capacity at the command of the Comptroller. It was decided that these (and other) records should be delivered to the Comptroller in Detroit, to be processed there by one of his employees, and prepared for final deposit in the National Archives.

At the termination of every receivership there are numerous dividend checks which are uncalled for by the creditors. These are invariably forwarded to the Washington office of the Comptroller, who has a small group of employees engaged in further efforts to effect delivery. At the termination of this receivership the volume of such undelivered checks was so large as to be beyond the capacity of the clerical group in Washington and it was determined to effect delivery of these checks to the Comptroller in Detroit. The purpose was to accomplish as much as possible toward full delivery in Detroit, thus reducing the load of detail and correspondence in the Washington office.

For this purpose the Comptroller designated one of his employees, Mr. Joseph T. Connolly, to accept delivery of books and records and of dividend checks from Receiver Schram on the final termination of the receivership, and to act as Custodian of the same until they could be permanently lodged in the National Archives. Mr. Connolly functioned in this manner until June 30, 1946, when the records and the checks still undelivered were shipped to Washington to be lodged in the National Archives, or in the office of the Comptroller of the Currency, and his office in Detroit was closed.

[fol. 72] Upon the resignation of Receiver Schram, Mr. Joseph T. Connolly was given a commission as Receiver, to

act in such incidental cases that might require action by a Receiver. His duties as to the books and records, and as to the undelivered dividend checks were performed in his capacity as employee of the Comptroller, acting under his direction, and not as Receiver.

At the service of the petition in this case, the Comptroller was maintaining six accounts in the National Bank of Detroit, entitled in the Comptroller, for the benefit of creditors, and distinguished as 1st, 2nd, 3rd, 4th, 5th and 6th (final) dividends, in a sum equal to the aggregate amount of undelivered dividend checks in the hands of the Comptroller, plus the total of such Comptroller's checks as had been delivered but were not presented at the Bank for payment.

The above amounts are diminishing daily, as checks are called for and delivered, and as they were presented at the Bank for payment.

Further deponent says not.

R. B. McCandless.

Subscribed and sworn to before me this 27th day of August, 1946. —— ——, Notary Public, District of Columbia. My commission expires November 30, 1948.

[fol. 73] IN UNITED STATES DISTRICT COURT

SUMMONS—Filed September 11, 1946

To the above named Defendant:

You are hereby summoned and required to serve upon John R. Dethmers, Attorney General, Capitol Building, Lansing 2, Michigan, plaintiff's attorney, whose address —— —— —— an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

George M. Read, Clerk of Court, by Albert L. Alfred, Deputy Clerk. (Seal of Court.)

Date: Aug. 29, 1946.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 74] DISTRICT COURT OF THE UNITED STATES, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

No. 5824

JOHN R. DETHMERS, Attorney General in the name and on behalf of the People of the State of Michigan,

v.

PRESTON DELANO, Comptroller of the Currency of the U. S. et al.

SUMMONS IN CIVIL ACTION

Returnable not later than — days after service.
John R. Dethmers, Attorney for Plaintiff.

[fol. 75] RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the — day of August, 1946, I received the within summons and served the same upon John C. Lehr, United States Attorney for the Eastern District of Michigan, Southern Division and Bill of Complaint filed in the above matter.

Marshal's Fees
Travel $ —
Service

—— ——, United States Marshal, by —— ——, Deputy United States Marshal.

Subscribed and sworn to before me, a —— ——, this — day of August, 1946. —— ——. (Seal.)

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

[fol. 76] RETURN ON SERVICE

UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

File No. 5824

I hereby certify and return that on the 29th day of August, 1946, I served the annexed summons and the complaint filed in this cause on Preston Delano by handing to and leaving a copy of the summons and copy of said complaint with Preston Delano (by Registered Mail, return receipt requested) personally at Washington, D. C., in said District.

John J. Bare, U. S. Marshal, by John W. Ingram, Deputy.

Form 1—To be used for Personal Service.

[fol. 77] RETURN ON SERVICE

UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

File No. 5824

I hereby certify and return that on the 29th day of August, 1946, I served the annexed summons and the complaint filed in this cause on Tom Clark, Attorney General, by handing to and leaving a copy of the summons and copy of said complaint with Tom Clark (By Registered Mail, return receipt requested) personally at Washington, D. C., in said District.

John J. Bare, U. S. Marshal, by John W. Ingram, Deputy.

Form 1—To be used for Personal Service.

[fol. 78] RETURN ON SERVICE

UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

File No. 5824

I hereby certify and return that on the 29th day of August, 1946, I served the annexed summons and the complaint filed in this cause on John C. Lehr by handing to and leaving a copy of the summons and copy of said complaint with John C. Lehr personally at Detroit, Mich. in said District.

John J. Bare, U. S. Marshal, By John W. Ingram, Deputy.

Form 1—To be used for Personal Service.

[fol. 79] IN UNITED STATES DISTRICT COURT

NOTICE OF HEARING—Filed May 2, 1947

To: Honorable Eugene F. Black, Attorney General for the State of Michigan.

Honorable Archie C. Fraser, Assistant Attorney General for the State of Michigan and State Public Administrator, Capitol Building, Lansing, Michigan.

You will please take notice that the motion of the defendant, Preston Delano, Comptroller of the Currency of the United States, to quash service of process and dismiss as to him, and the motion on behalf of the defendant, Joseph T. Connolly, to dismiss the petition of the plaintiff in the within cause as to him, will be brought on for hearing before the Honorable Arthur F. Lederle, District Judge, at his court room in the Federal Building, in the City of Detroit, on Monday, June 2, 1947, at ten o'clock in the forenoon, or as soon thereafter as counsel may be heard.

Robert S. Marx, Orville J. Thill, Lawrence I. Levi and Frank M. Wiseman, by Lawrence I. Levi, Attorneys for the defendants, 2443 National Bank Bldg., Detroit 26, Mich.—Cherry 6075.

Dated May 1, 1947.

[fol. 80] IN UNITED STATES DISTRICT COURT

ORDER SUBSTITUTING PLAINTIFF AND ATTORNEY FOR PLAINTIFF—Filed June 9, 1947

At a session of said court held in the Federal Building, in Detroit, on June 9, 1947.

Present: Hon. Arthur F. Lederle, District Judge.

In accordance with the request of counsel for plaintiff, consented to by counsel for defendants,

It is hereby ordered that Eugene F. Black, Attorney General of the State of Michigan, successor to the named plaintiff herein, be and he is hereby substituted as plaintiff herein, and as attorney for plaintiff herein.

Arthur F. Lederle, U. S. District Judge.

[fol. 81] IN UNITED STATES DISTRICT COURT

ORDER OF DISMISSAL—Filed July 10, 1947

At a session of said court held in the Federal Building, Detroit, this 10th day of July, A. D., 1947.

Present; Honorable Arthur S. Lederle, District Judge.

This case having come on for hearing upon motion to quash and dismiss filed by defendant Preston Delano on August 13, 1946, and upon the motion to dismiss filed by defendant Joseph T. Connolly, also filed on August 13, 1946, and the court having heard the arguments of counsel in connection therewith and duly considered the briefs filed,

Now, therefore, it is ordered that said motions to quash and dismiss be, and they are hereby granted, and this case is hereby dismissed.

Arthur F. Lederle, District Judge.

[fol. 82] IN UNITED STATES DISTRICT COURT

ORDER CORRECTING DOCKET ENTRIES OF JUNE 9 AND 23, 1947—Filed September 4, 1947

At a session of said court held in the Federal Building, Detroit, Michigan on September 4, 1947.

Present: Honorable Arthur F. Lederle, District Judge.

This case having come on for oral arguments of defendants' motions to dismiss on June 9, 1947, on which date oral

arguments were heard and concluded and defendants submitted to the court a memorandum brief in support of their motions, and, in compliance with the request of counsel, the time for submitting plaintiff's reply brief was fixed at June 16, 1947 and the time for submitting defendant's reply to such reply brief was fixed at June 23, 1947, and on June 23, 1947 this latter time was further extended to July 14, 1947, plaintiff's reply brief having been submitted on June 16, 1947, and prior to July 10, 1947, defendants' counsel having advised the court that no reply to plaintiff's reply brief would be submitted so that the case was then ready for decision on motions to dismiss, and an order granting motions to dismiss having been entered on July 10, 1947, and it now appearing that the docket entries of this case, thru a clerical error show hearing of said motions to dismiss held in part on June 9, 1947 and continued to June 23, 1947 and a further continuance of said motions from June 23, 1947 to July 14, 1947,

[fol. 83] Now, therefor, the court sua sponte does hereby order that the docket entries of this case for June 9 and 23, 1947 be corrected to read as follows:

> "June 9, 1947—hearing held on motions to dismiss and the time for submitting briefs fixed at June 23, 1947."
>
> "June 23, 1947—defendants granted until July 14, 1947 for submitting reply to plaintiff's reply brief."

Arthur F. Lederle, District Judge.

[fol. 84] IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL TO THE SIXTH CIRCUIT COURT OF APPEALS—Filed October 2, 1947

Notice is hereby given that Eugene F. Black, Attorney General, successor to John R. Dethmers, in the name and on behalf of the People of the State of Michigan, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Sixth Circuit from the Order of Dismissal entered in this action on July 10, 1947.

Dated: October 2, 1947.

Eugene F. Black, Attorney General, by Archie C. Fraser, Assistant Attorney General and State Public Administrator, by Percival R. Piper, Assistant Attorney General, Attorneys for Plaintiff and Appellants.

[fol. 85] Bond on appeal for $250.00, filed October 2, 1947, omitted in printing.

[fol. 86] IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF RECORD ON APPEAL—Filed October 9, 1947

Eugene F. Black, Attorney General, Archie C. Fraser and Percival R. Piper, Assistant Attorneys General, attorneys for plaintiff and appellant in the above entitled matter, designate the entire record and proceedings in said cause to be contained in the record on appeal, to wit:

1. Petition for Declaratory Judgment and Other Relief, including Exhibits "A" and "B" attached thereto.
2. Summons dated June 25, 1946 and returns of service attached thereto.
3. Appearance of Defendant, Joseph T. Connolly.
4. Stipulation.
5. Order Dissolving Restraining Order and Dismissing Order to Show Cause.
6. Order to Show Cause and Temporary Restraining Order.
7. Stipulation for Extension of Time of Connolly, Receiver, to Plead, dated July 11, 1946.

8. Order for Extension of Time of Connolly, Receiver, to Plead, dated July 12, 1946.

9. Stipulation for Extension of Time of Connolly, Receiver, to Plead, dated July 23, 1946.

10. Order for Extension of Time of Connolly, Receiver, to Plead, dated July 29, 1946.

[fol. 87] 11. Special appearance of Preston Delano, Comptroller of the Currency of the United States of America, and Motion to Quash Service of Process and to Dismiss Action.

12. Motion on Behalf of the Defendant, Joseph T. Connolly to Dismiss the Plaintiff's Petition.

13. Affidavit of R. B. McCandless in support of Motion to Dismiss.

14. Summons dated August 29, 1946 and Returns of Service attached thereto.

15. Notice of Hearing dated May 1, 1947.

16. Order Substituting Plaintiff and Attorney for Plaintiff.

17. Order of Dismissal, dated July 10, 1947.

18. Order Correcting Docket Entries of June 9 and 23, 1947, dated September 4, 1947.

Eugene F. Black, Attorney General; Archie C. Fraser, Percival R. Piper, Assistant Attorneys General, by Archie C. Fraser, Assistant Attorney General, Attorneys for Plaintiff, State Capitol, Lansing 2, Michigan.

Dated: October 7, 1947.

[fol. 88] IN UNITED STATES DISTRICT COURT

STIPULATION EXTENDING TIME TO FILE RECORD ON APPEAL —Filed November 7, 1946

It is hereby Stipulated and Agreed, by and between the attorneys for the respective parties hereto that the time for filing the record on appeal be extended to December 7, A. D. 1947.

Eugene F. Black, Attorney General of Michigan; Archie C. Fraser, Assistant Attorney General and State Public Administrator, by Percival R. Piper, Assistant Attorney General, Attorneys for Plaintiff-Appellant. Robert S. Marx, Lawrence I. Levi, Orville J. Thill and Frank M. Wiseman, by Lawrence I. Levi, Attorneys for Defendant-Appellee, Joseph T. Connolly, as Receiver of First National Bank-Detroit, and as Detroit Representative of the Comptroller of the Currency of the United States.

Dated: November 6, 1947.

PRP:am.

[fol. 89] IN UNITED STATES DISTRICT COURT

ORDER EXTENDING TIME—Filed November 7, 1947

At a session of the said Court, held in the Federal Building, Detroit, Michigan, on November 7, 1947,

Present: Honorable Arthur F. Lederle, United States District Judge

Upon reading and filing the attached stipulation for extention of time to file record on appeal,

It is hereby Ordered, that the time within which the plaintiff and appellant may file the record on appeal and have the same docketed with the Clerk of the United States District Court on Appeals for the Sixth Circuit is hereby extended to December 7, 1947.

Arthur F. Lederle, United States District Judge.

[fol. 90] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO ADDITIONAL CONTENTS OF RECORD ON APPEAL—Filed November 7, 1947

It is hereby stipulated, by and between the attorneys for the below named parties hereto, that the following from the files and records herein may and shall be added to the record on appeal in the above entitled cause, this stipulation being supplementary and in addition to the designation of contents of the record heretofore filed herein by attorneys for plaintiff-appellant:

1. Calendar entries.
2. Notice of Appeal.
3. Bond on Appeal.
4. Designation of Contents of Record on Appeal.
5. Stipulation as to Additional Contents of Record on Appeal.
6. Stipulation Extending Time to File Record on Appeal.
7. Order Extending Time to File Record on Appeal.

[fol. 91] 8. Stipulation re Comparison of Record.

9. Certificate of Clerk.

Eugene F. Black, Attorney General, by Archie C. Fraser, Assistant Attorney General and State Public Administrator, by Percival R. Piper, Assistant Attorney General, Attorneys for Plaintiff-Appellant. Robert S. Marx, Lawrence I. Levi, Orville J. Thill and Frank M. Wiseman, by Lawrence I. Levi, Attorneys for Defendant-Appellee, Joseph T. Connolly, as Receiver of First National Bank-Detroit, and as Detroit Representative of the Comptroller of the Currency of the United States.

Dated: November 7th, 1947.

[fol. 92] IN UNITED STATES DISTRICT COURT

STIPULATION RE COMPARISON OF RECORD—Filed November 7, 1947

It is hereby stipulated by and between the attorneys for the respective parties hereto that the Record on Appeal as printed be certified and transmitted by the Clerk of the United States District Court for the Eastern District of Michigan to the United States Circuit Court of Appeals for the Sixth Circuit without comparison.

Eugene F. Black, Attorney General, by Archie C. Fraser, Assistant Attorney General and State Public Administrator, by Percival R. Piper, Assistant Attorney General, Attorneys for Plaintiff-Appellant. Robert S. Marx, Lawrence I. Levi, Orville J. Thill and Frank M. Wiseman, by Lawrence I. Levi, Attorneys for Defendant-Appellee, Joseph T. Connolly, as Receiver of First National Bank-Detroit, and as Detroit Representative of the Comptroller of the Currency of the United States.

Dated: November 7, 1947.

[fol. 93] IN UNITED STATES DISTRICT COURT

STIPULATION EXTENDING TIME TO FILE RECORD ON APPEAL—Filed December 2, 1947

It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto that the time for filing the record on appeal be extended to Tuesday, December 30, 1947.

Eugene F. Black, Attorney General of Michigan; Archie C. Fraser, Assistant Attorney General and State Public Administrator, by Percival R. Piper, Assistant Attorney General, Attorneys for Plaintiff-Appellant. Robert S. Marx, Lawrence I. Levi, Orville J. Thill, and Frank M. Wiseman, by Lawrence I. Levi, Attorneys for Defendant-Appellee; Joseph T. Connolly, as Receiver of First National Bank—Detroit, and as Detroit Representative of the Comptroller of the Currency of the United States.

Dated: December 2, 1947.

[fol. 94] In United States District Court

Order Extending Time to File Record on Appeal—Filed December 2, 1947

At a session of the said Court, held in the Federal Building, at Detroit, Michigan on December 2, 1947.

Present: Honorable Arthur F. Lederle, United States District Judge.

Upon reading and filing the attached stipulation for extension of time to file record on appeal,

It is hereby ordered, that the time within which the plaintiff and appellant may file the record on appeal and have the same docketed with the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, is hereby extended to December 30, 1947.

Arthur F. Lederle, United States District Judge.

[fols. 95-96] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 97] In the United States Court of Appeals for the Sixth Circuit

Cause Argued and Submitted—October 14, 1948

Before Hicks, Chief Judge, Martin and McAllister, Circuit Judges

This cause is argued by Julius H. Amberg and Archie C. Fraser for appellant and by Robert S. Marx for appellees and is submitted to the Court.

In United States Court of Appeals

Order—Filed November 30, 1948

The so-called "Chronology", filed and presented at the hearing of this cause by the advocate appearing for the appellees, has not been considered by the court and is

ordered to be stricken, for the reason that it carries beyond the record in the case and contains argumentative matter not presented consistently with the rules of this court.

[fol. 98] In United States Court of Appeals

Judgment—Entered November 30, 1948

Appeal from the District Court of the United States for the Eastern District of Michigan.

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the order of dismissal of the said District Court in this cause be and the same is hereby affirmed.

In United States Court of Appeals

Opinion—Filed November 30, 1948

Before Hicks, Chief Judge, Martin and McAllister, Circuit Judges

Martin, Circuit Judge:

Our appellate jurisdiction has been repeatedly invoked in litigation involving, in varying phases, the right of the State of Michigan to apply its statutes of escheat to deposits in the First National Bank-Detroit, a national bank in liquidation.

In *Starr, Attorney General* v. *O'Connor, Comptroller of the Currency*, 6 Cir., 118 F. (2d) 548 [decided March 14, 1941] certiorari denied 314 U. S. 695, we reviewed at length the state's escheat laws, construed relevant provisions thereof, and attempted to demonstrate from highest authority that, while national banks are subject to state laws which do not interfere with the purposes of their creation, or tend to impair or destroy their efficiency as federal agencies, or conflict with the paramount law of the United States, the then existing Michigan escheat procedure con-

[fol. 99] stituted an unlawful interference with the liquidation of a national bank. We pointed to the decisions of the Supreme Court in *Cook County National Bank* v. *United States*, 107 U. S. 445, 448; *Davis* v. *Elmira Savings Bank*, 161 U. S. 445, and *First National Bank of San Jose* v. *State of California*, 262 U. S. 366.

After our opinion was promulgated, the legislature of Michigan amended the state laws of escheat by Act No. 170, Public Acts of 1941. In *Rushton, Att'y Gen.* v. *Schram*, 6 Cir., 143 F. (2d) 554 [decided May 31, 1944], we held that the amendatory act did not apply *retroactively* to dormant deposits in the insolvent First National Bank-Detroit. The majority opinion in that case assumed upon principles of comity that the state legislature had not intended to enact a law, effective retroactively, which would interfere with the complete system provided by Congress for winding up national banks and distributing their effects in a manner neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates.

We expressed the further presumption that the Michigan legislature had not designed to nullify the decision of this court in the *Starr* case, but had enacted a law intended to operate *prospectively* only. *Anderson National Bank* v. *Luckett*, 321 U. S. 233 (which was announced after the filing date of this court's opinion in *Starr, Att'y Gen.* v. *O'Connor, Comptroller of the Currency, supra*), was distinguished upon the ground that, there, the Supreme Court's adjudication related to the applicability of a state's laws of escheat to deposits in a *solvent and operating* national bank. One of our judges, however, based concurrence in the result reached upon the proposition that the Michigan amendatory act operated in the context as an unlawful interference with the liquidation of a national bank as provided for in Title 12, section 194, of the United States Code. The majority opinion did not gainsay this, but attributed to the Michigan legislature no intended interference with the liquidation of the First National Bank-Detroit.

[fol. 100] In *Starr, Att'y Gen.* v. *Schram*, 6 Cir., 143 F. (2d) 561 [decided on the same day, May 31, 1944], this court, in unanimity, affirmed the decree of the district court to the effect that the escheat statutes of Michigan, *including Act 170 of the Public Acts of Michigan for 1941*, constitute an unlawful interference with the liquidation of an insolvent

national bank and are inapplicable to the receivership of the First National Bank-Detroit. The decree below was reversed in part, but not in respect to the clear-cut holding just stated.

The same statute, Act 170, is involved in the present litigation, which on its merits relates only to the attempt of the State of Michigan to apply its escheat laws to deposits where depositors have had their claims allowed by the receiver, the Comptroller of the Currency, or both, and have, since that time, either died, disappeared, failed to receive or to cash dividend checks issued to them.

Both defendants in the district court, Delano, Comptroller, and Connolly, Receiver, moved to dismiss the instant action. The Comptroller of the Currency, in his special appearance, combined his motion to dismiss with a motion to quash the service upon the ground that he could not, without his consent, be properly sued outside the District of Columbia. The motion of the receiver also challenged the jurisdiction of the district court for the eastern district of Michigan, and additionally pleaded no cause of action.

The district court granted both motions, as made. Assuming without deciding that the action was brought in the right district, we are of opinion that the judgment of dismissal should be affirmed on the merits. The present action brought by the State of Michigan to apply its laws of escheat in the circumstances related constitutes an unlawful interference with the liquidation of a national bank upon the same principles and authority fully discussed in our previous opinions. The valiant spirit displayed in continuing litigation by successive attorneys general of Michigan and able special counsel retained to aid them is commendable, but we think their present battle is fought upon [fol. 101] essentially the same legal grounds upon which former contests have been waged. The authorities which they now submit have been previously carefully considered and rejected as failing to sustain their major objective.

The fact that we encounter here proven claims rather than dormant deposits supplies no logical basis for a declination to apply settled doctrine. The order of dismissal is affirmed.

In United States Court of Appeals

Motion for Substitution of Appellant and Attorney—Filed January 11, 1949

Stephen J. Roth, Attorney General of the State of Michigan, successor in said office to Eugene F. Black, respectfully shows this Court:

1. After the rendition of judgment in the above-entitled cause on the 30th day of November, 1948, by this Court, the said Stephen J. Roth, on January 1, 1949, succeeded Eugene F. Black as Attorney General of the State of Michigan.

2. Stephen J. Roth, in the name and on behalf of the People of the State of Michigan, may desire to prosecute an appeal from said judgment of this Court to the Supreme Court of the United States, and to petition that Court for certiorari.

Wherefore Stephen J. Roth moves the Court for an order substituting himself in the place and stead of said Eugene [fol. 102] F. Black as appellant and as attorney for appellant in this action.

Dated January 11, 1949.

Stephen J. Roth, Attorney General of the State of Michigan, by Julius H. Amberg, Special Assistant Attorney General of Michigan, One of Appellant's Attorneys.

Consent: (S.) Robert S. Marx.

In United States Court of Appeals

Order of Substitution—Filed January 11, 1949

It appearing to the Court that Stephen J. Roth has succeeded Eugene F. Black to the office of Attorney General of the State of Michigan, and that said Stephen J. Roth has moved this Court to be substituted as appellant and as an attorney for appellant in the place and stead of said Eugene F. Black in the above-entitled cause:

It Is Ordered that Stephen J. Roth be and he is hereby substituted as appellant and as an attorney for appellant in the place and stead of said Eugene F. Black.

Dated: January 11, 1949.

Thomas F. McAllister, United States Circuit Judge, Sixth Circuit.

[fol. 103] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 104] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT

No. 10,615

STEPHEN J. ROTH, Attorney General, Successor to Eugene F. Black, Attorney General, in the Name and on behalf of the People of the State of Michigan, Appellant,

vs.

PRESTON DELANO, Comptroller of the Currency of the United States of America, and Joseph T. Connolly, as Receiver of the First National Bank-Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency of the United States of America, Appellee

PETITION FOR ALLOWANCE OF APPEAL—Filed January 26, 1949

The above mentioned appellant respectfully shows that a judgment was rendered in the above-entitled cause by the above-entitled Circuit Court of Appeals on the 30th day of November, 1948, *sub nom.* Eugene F. Black, Attorney General vs. Preston Delano, Comptroller of the Currency of the United States, et al., affirming the order of the District Court of the Eastern District of Michigan, Southern Division, and that this cause is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Appellant files with this petition his assignment of errors setting out separately and particularly each error asserted by him.

Appellant presents with this petition a separate typewritten statement particularly disclosing the basis upon which it is contended that the Supreme Court has jurisdiction upon appeal to review the aforesaid judgment.

[fol. 105] Wherefore the appellant prays that an appeal be allowed him in the above-entitled cause and that the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit be directed to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in said assignment of errors herewith filed may be reviewed, and if error be found, corrected according to the laws of the United States.

Dated: January 25, 1949.

Stephen J. Roth, Attorney General. Edmund E. Shepherd, Solicitor General. Archie C. Fraser, Assistant Attorney General, State Capitol, Lansing 2, Michigan. Julius H. Amberg, Special Assistant Attorney General, 500 Michigan Trust Building, Grand Rapids 2, Michigan, Attorneys for Appellant.

[fol. 106] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

[Title omitted]

ASSIGNMENTS OF ERROR—Filed January 26, 1949

Now comes, Stephen J. Roth, as Attorney General of the State of Michigan and successor to Eugene F. Black, heretofore Attorney General of said State, in behalf of the People of the State of Michigan and as plaintiff and appellant in connection with his petition for appeal, and files the following assignments of error on which he will rely on his appeal to the Supreme Court of the United States from the judgment and decree of the Circuit Court of Appeals for the Sixth Circuit, filed and entered on November 30, 1948, *sub nom.* Eugene F. Black, Attorney General, v. Preston Delano, Comptroller of the Currency of the United States of America, et al., viz.:

[fol. 107] The said Court erred:

1. In affirming the order of the District Court of the United States for the Eastern District of Michigan, Southern Division, which on July 10, 1947, dismissed the petition of plaintiff filed in said Court upon defendant Connolly's motion to dismiss said petition.

2. In not reversing the said order of said District Court and in not requiring said defendant Connolly, as Receiver of First National Bank-Detroit and Representative of the Comptroller of the Currency, to answer said petition.

3. In not declaring and adjudging that Act No. 238 of the Public Acts of Michigan for the year 1897 and amendments thereof, being Sections 13,455 to 13,477, both inclusive, of the Compiled Laws of Michigan for 1929, as amended by Act 170 of the Public Acts of Michigan for 1941, being the law of said State relating to escheatable estates and abandoned property, is valid and is applicable to First National Bank-Detroit, a national banking association heretofore declared insolvent, and that the defendant Joseph T. Connolly, as Receiver of said bank and as Representative of the Comptroller of the Currency, is bound by said Michigan law with respect to proven deposits in said bank.

4. In holding that said Michigan law, if applied to proven claims of depositors in First National Bank-Detroit in liquidation, constitutes an unlawful interference with the liquidation of a national bank and is invalid as repugnant to the National Bank Law of the United States, and in particular to Sec. 194 thereof (Title 12, U. S. Code, Sec. 194; Revised Statutes 5236).

5. In not holding (although assuming) that the District Court of the United States for the Eastern District of Michigan, Southern Division, had jurisdiction over the sub-
[fol. 108] ject matter of the petition of the plaintiff filed in said District Court.

6. In not holding (although assuming) that said suit would lie against defendant Connolly, Receiver of said bank and as Representative of the Comptroler, with respect to the application of said Michigan law to proven claims of depositors in said bank.

7. In not holding (although assuming) that defendant Connolly is, and at the time of institution of suit was, Receiver of said bank and subject to said suit.

8. In the rendition of the final judgment and decree in this cause filed and entered November 30, 1948.

Stephen J. Roth, Attorney General. Edmund E. Shepherd, Solicitor General. Archie C. Fraser, Assistant Attorney General, State Capitol, Lansing 2, Michigan. Julius H. Amberg, Special Assistant Attorney General, 500 Michigan Trust Building, Grand Rapids 2, Michigan, Attorneys for Appellant.

[fol. 109] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

[Title omitted]

ORDER ALLOWING APPEAL—Filed January 26, 1949

It appearing to the Court in the above-entitled cause that the appellant has filed his petition for appeal to the Supreme Court of the United States, and has filed therewith his assignment of errors, and also his statement as to the jurisdiction of the Supreme Court of the United States as required by Rule 12 of the Supreme Court Rules, duly disclosing that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question;

[fol. 110] It is hereby ordered by the Court that the appeal prayed for be and the same is hereby allowed and granted to the Supreme Court of the United States from the judgment rendered in said cause on the 30th day of November, 1948, *sub nom.* Eugene F. Black, Attorney General vs. Preston Delano, Comptroller of the Currency of the United States, et al., and that appellant give an appeal bond with good and sufficient surety and conditioned according to law in the penal sum of $1,000.00.

Dated: January 25, 1949.

Thomas F. McAllister, United States Circuit Judge, Sixth Circuit.

[fols. 111-113] Bond on appeal for $1,000.00 approved and filed Jan. 26, 1949, omitted in printing.

[fol. 114] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed January 26, 1949

To: The Clerk

Please prepare a transcript of the record in the above-entitled cause in the matter of appeal therein to the Supreme Court of the United States, and include in said transcript in the order given below the following:

1. The entire record and proceedings, as received by you in the above-entitled cause in the United States District Court for the Eastern District of Michigan, Southern Division.

2. The entire record and proceedings in the above-entitled cause in this Court.

3. Petition for appeal to the Supreme Court.

4. Assignment of errors.

[fol. 115] 5. Statement as to the jurisdiction of the Supreme Court of the United States.

6. Order allowing the appeal and fixing the bond.

7. The appeal bond.

8. Motion to substitute appellant and attorney for appellant.

9. Order substituting appellant and attorney for appellant.

10. Consent to substitution as appellant and attorney for appellant.

11. Service of appeal papers and notice to appellee of Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States.

12. Citation.

13. Praecipe for transcript of record.

14. Acknowledgment of service of notice and appeal papers on appellee.

Dated: January 25, 1949.

Stephen J. Roth, Attorney General. Edmund E. Shepherd, Solicitor General. Archie C. Fraser, Assistant Attorney General, State Capitol, Lansing 2, Michigan. Julius H. Amberg, Special Assistant Attorney General, 500 Michigan Trust Building, Grand Rapids 2, Michigan, Attorneys for Petitioner.

[fol. 116] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

[Title omitted]

CONSENT TO SUBSTITUTION AS APPELLANT AND ATTORNEY FOR APPELLANT—Filed January 26, 1949

I, Eugene F. Black, consent that Stephen J. Roth, my successor in the office of Attorney General of the State of Michigan, be substituted in my place and stead as appellant and attorney for appellant in the above-entitled cause.

Dated January 11, 1949.

Eugene F. Black.

[fols. 117-118] Citation in usual form showing service on Robert S. Marx, omitted in printing.

[fol. 119] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 120] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND OF THE PARTS OF THE RECORD WHICH APPELLANT THINKS NECESSARY FOR THE CONSIDERATION THEREOF—Filed February 19, 1949

Pursuant to Rule 13, paragraph 9, of the Revised Rules of this Court, appellant states that he intends to rely upon all the points in his assignment of errors.

Appellant deems the entire record, as filed in the above-entitled cause, necessary for consideration of the points relied upon.

Dated: February 14, 1949.

Stephen J. Roth, Attorney General. Edmund E. Shepherd, Solicitor General. Archie C. Fraser, [fol. 121] Assistant Attorney General, State Capitol, Lansing 2, Michigan. Julius H. Amberg, Special Assistant Attorney General, 500 Michigan Trust Building, Grand Rapids 2, Michigan, Attorneys for Appellant.

Service of the foregoing statement of appellant as to points to be relied upon and parts of the record necessary for consideration thereof is hereby acknowledged.

Dated: Feb. 15, 1949.

Robert S. Marx, Attorneys for Appellee.

[fol. 121a] [File endorsement omitted.]

[fol. 122] SUPREME COURT OF THE UNITED STATES

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION AND OF THE MOTION TO DISMISS OR AFFIRM —March 28, 1949

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court and

of the motion to dismiss or affirm is postponed to the hearing of the case on the merits.

Endorsed on Cover: Enter Edmund E. Shepherd. File No. 53,568 U. S. Court of Appeals, Sixth Circuit, Term No. 566. Stephen J. Roth, Attorney General of the State of Michigan, etc., Appellant, vs. Preston Delano, Comptroller of the Currency of the United States of America, et al. Filed February 16, 1949. Term No. 566 O. T. 1948.

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Statutes Cited

Act 238 of the Public Acts of Michigan for the year 1897 and amendments thereof, being Sections 13, 455 to 13, 477 of the Compiled Laws of Michigan for 1929 (Vol. 3, p. 4814 and Mason's Supplement of 1940 (p. 1431), as amended by Act 170 of the

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Public Acts of Michigan for 1941 (p. 245), Sections 4b, 5, 6, 6a, 7, 9, 9a, 9b, 10, 10a, 10b, 13, 13a, 15, 21, 22 and 23 . . . 2

Judicial Code Section 240 (28 U.S.C. 340) as revised by the Act of June 25, 1948 (28 U.S.C. 1254(2)) . . . 12, 13

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United States Code, Title 28, Sec. 1254(2) as revised by the Act of June 25, 1948 . . . 1

UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT

No. 10,615

STEPHEN J. ROTH, ATTORNEY GENERAL, SUCCESSOR TO EUGENE F. BLACK, ATTORNEY GENERAL, IN THE NAME AND ON BEHALF OF THE PEOPLE OF THE STATE OF MICHIGAN,

Appellant,

vs.

PRESTON DELANO, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES OF AMERICA, AND JOSEPH T. CONNOLLY, AS RECEIVER OF THE FIRST NATIONAL BANK-DETROIT, A NATIONAL BANKING ASSOCIATION, AND AS DETROIT REPRESENTATIVE, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES OF AMERICA,

Appellee.

JURISDICTIONAL STATEMENT

Statutory Provisions Sustaining Jurisdiction

The jurisdiction of the Supreme Court of the United States upon appeal is invoked under Title 28, U. S. Code, Sec. 1254(2), as revised by the Act of June 25, 1948.

Date of Judgment and Application for Appeal

The final judgment and decree of the Court of Appeals for the Sixth Circuit was entered November 30, 1948, *sub nom. Eugene F. Black, Attorney General,* v. *Preston Delano, Comptroller of the Currency of the United States of America, et al.*

Application for appeal is herewith presented on the 25th day of January, 1949.

Michigan Statute Validity of Which Is Involved

The statute of the State of Michigan the validity of which is involved is the Michigan law relating to escheatable and abandoned property, being Act 238 of the Public Acts of Michigan for the year 1897 and amendments thereof, being Sections 13,455 to 13,477, both inclusive, of the Compiled Laws of Michigan for 1929 (Vol. 3, p. 4814), and Mason's Supplement of 1940 (p. 1431), as amended by Act 170 of the Public Acts of Michigan for 1941 (p. 245).

The Michigan Constitution of 1908, Article VI, Section 20, creates a State Board of Escheats, composed of the Secretary of State, the State Treasurer and the Commissioner of the State Land Office (Vol. 1, Comp. Laws of Mich. 1929, p. 216).

Inasmuch as the opinion in the Circuit Court of Appeals held the Michigan law invalid on the broad ground that a State escheat law interferes with the liquidation of a national bank under the federal statute rather than because of any particular provisions of the Michigan statute, we summarize the Michigan law as follows:

Sec. 5 and other sections placed the duty upon the Attorney General of Michigan to protect the interests of the State in any unclaimed, uncalled-for or abandoned money, securities, credits or property.

Sec. 4b contains definitions, under which a "depository" is defined to include any person who or which has in his or its possession or under his or its control any property, including liquidated choses in action, for which he or it is indebted or accountable to any other person as depositor. The same section defines "person" to include, among others,

an association, a bank, any governmental department, agency or official, a receiver, a fiduciary, a custodian, and a liquidating officer.

Sec. 6 requires reports to the State Board of Escheats on June 30th each year from each depository, giving the dates, amounts and interest thereon, of deposits and the names of depositors, "where no dealings or transactions have been had between the depositor and the depository with respect to any money, credits, securities or property of any kind for a period of seven years or more."

Sec. 6a directs the State Board of Escheats, or the Attorney General, to demand reports, upon receiving information or having good reason to believe that any money, credits, securities or property of any kind have been unclaimed, uncalled-for or abandoned, where no dealings or transactions have been had between the depositor and the depository with respect to such property for a period of seven years or more. By the same section, the Board and the Attorney General are given the same powers with respect to examination of the books and records of the depositories making such reports as are provided by the banking laws of the State with respect to examination of banks.

Sec. 7 provides that any depository who, after being required to make report by the Board or Attorney General. shall fail to file the same, shall be liable to the State in the penal sum of $300.00 for each such failure and the additional sum of $10.00 for every day while the report remains unfiled.

Sec. 9 places the duty on the Attorney General to file a bill in chancery, in behalf of the People of the State of Michigan, in any court having jurisdiction or other proper proceeding to compel a full, complete and truthful statement of the matter required to be contained in the report.

Sec. 9a subjects to escheat, in the case of a depository operating within the State whose business is being liquidated, any money or credits belonging to a depositor for which no claim has been filed or for which no demand has been made, where no dealings were had with the depository or with the receiver, custodian or liquidating agent for a period of seven years; and authorizes the Attorney General to intervene in behalf of the People of the State or to institute suit to have such property decreed to be escheated to the State. The Attorney General is also authorized to file claims with the receiver, custodian or liquidating agent, dividends thereon to be paid to the State Board.

Sec. 9b provides that, where money, credits, etc., have been unclaimed or uncalled-for or abandoned for a period of seven years or more by the depositor, the Attorney General, in the name of the People of the State, may institute suit in the Circuit Court, in Chancery, to escheat the same, in which suit the depository and the depositors shall be made parties defendant. The section requires that personal service shall be made upon the depositories and upon the depositors, if they be found, and, if not, that they be served by publication for six successive weeks in a newspaper printed and published in the county. The court at the hearing is directed, upon a finding that the property has been abandoned, to decree the property escheated or transferred to the State and to direct that the same be paid to the State Board of Escheats.

Sec. 10 provides an alternative method in the case of a depositor whose identity is unknown or where the depositor has had no dealings or transactions in regard to the property within seven years, and where there is good reason to believe that the depositor is dead. In such case the Attorney General, or the State Public Administrator, is given the duty to take proceedings to have an administrator appointed

in the proper Probate Court to administer upon the estate of such missing depositor as a deceased person.

The administrator, upon giving bond, is given the right and duty to demand and receive from the depository deposits of the missing depositor, the administrator being also given rights of action to reduce the same to possession and control as administrator. The section further provides that, if there are no known heirs, legatees, devisees or assigns of the missing depositor, then, upon the allowance of the administrator's final report and accounting, the administrator shall assign the property or funds to the State Board of Escheats.

Sec. 10a provides that, in case there are no known heirs, legatees, devisees or assigns of a depositor, it shall be sufficient proof for the purposes of escheat when it appears from reliable sources and the books and records of the depository that the disappeared or missing depositor has had no dealings or transactions with the depository for a continuous period of seven years, but it is provided that, within thirty days after the granting of administration, notice of the granting of administration shall be published in the form of similar notices in the administration of the estates of deceased persons, and that notice of the hearing on the final account of the administrator shall be published for three weeks prior to the date of the final hearing.

Sec. 10b permits the combination in one administration proceeding of more than one estate, provided that the aggregate value of the known assets of the combined estates does not exceed $1,000.00.

Sec. 13 creates a presumption of death where any person disappears and his whereabouts remains unknown for the space of seven years and no knowledge of such person can be procured for such period, and provides that, if no person or persons are found who would be his heir or heirs

at law, then administration upon his estate shall be taken in accordance with the provisions of the law.

Sec. 13a creates a presumption of abandonment and escheat to the State where the depositor has had no dealings with a depository doing business, located or operating within the State for a period of seven years or more, and provides that no statute of limitations shall be a defense to escheat proceedings.

Sec. 15 provides that, upon the completion of the administration of an estate, escheated property shall be turned over to the State Board of Escheats as trustees, which shall cover the property or the avails thereof into the State treasury for the use of the primary school fund.

Sec. 21 directs that the Board of Escheats shall keep records of the property coming into its care and the time and amount of money covered into the State treasury on account of each estate, the account to be kept in the office of the State Treasurer as a public record.

Sec. 22 provides that, at any time after property is assigned to the State as an escheated estate or as abandoned property, any person may file with the Board of Escheats satisfactory proof, to be determined by the Board, of the right of such person, as husband, wife, heir at law, next of kin, devisee or legatee or assign, to the estate of the disappeared, missing or deceased person, in which case the Board, upon the payment to the Board of expenses which have been incurred in relation to the estate, shall cause the property to be turned over to such person. This section contains a similar provision giving the right to the assignee of any depositor other than a depositor who was a natural person, at any time upon satisfactory proof, to obtain the property. A like right is given to the depositor presumed to be deceased or to have abandoned his property and whose estate has been administered or whose property has been decreed to have been abandoned, at any time upon

satisfactory proof of his identity and right to the property, to receive the property. The section further provides that payment shall be made out of any money in the State treasury which has been derived from escheated estates or abandoned property, and the persons entitled to the deposit are expressly given the right to review by the Michigan Supreme Court, by certiorari, of any final decision of the State Board.

No time limit whatever is imposed upon the right of the person entitled to the property to claim the same.

Sec. 23 provides indemnity to the depository who has paid money or property to an administrator or the State Board of Escheats who is thereafter required to carry out and perform the contract of deposit with the depositor or the heirs, holders for value or assigns of the depositor or the person in whose name the property was held; the State being required to pay to the depository the amount of damage or loss it may have sustained, the amount to be paid out of any money in the State treasury which has been derived from escheated estates or abandoned property. The depository is given the right to review any final decision of the State Board of Escheats by the Michigan Supreme Court, by certiorari.

While there are other provisions of the statute relating to escheat of real property, the sale thereof and other details, the foregoing is a summary of the provisions believed pertinent to the issues in this suit.

Nature of the Case and Rulings of the Court

The case arose on petition of the Attorney General of Michigan filed in the United States District Court for the Eastern District of Michigan, Southern Division, June 25, 1946, for declaratory judgment and other relief pursuant to Sec. 274-d of the then Judicial Code, now in substance

Title 28, U. S. Code, Sections 2201 and 2202, as revised. The petition prayed that the Court declare that the Michigan law above mentioned is applicable to deposits in First National Bank-Detroit, a national banking association with its office in Detroit in said District, which bank had been declared insolvent in 1933 and liquidated. The petition also prayed that it be declared that the defendants are bound by said Michigan law and that they be enjoined from removing certain records from the State of Michigan. The defendants were Preston Delano, Comptroller of the Currency, and Joseph T. Connolly, a resident of Detroit, Receiver of the bank and Detroit Representative of the Comptroller. Delano obtained his dismissal from the case because he was a non-resident of the District. As no appeal was made on this point, Delano is out of the case.

Defendant Connolly appeared generally and moved to dismiss for the alleged reason that the petition failed to state a cause of action, Connolly also claiming that the Court lacked jurisdiction over the subject matter and that the suit would not lie against him as Receiver or as Representative of the Comptroller. The State of Michigan, through its Attorney General, claimed applicability of its law to deposits in the bank where the depositors had proved claims but thereafter had not been located to receive liquidation dividend checks or, if they had received such checks, had failed to cash the same.

The bank liquidation resulted in dividends to depositors aggregating 107.565% of the principal of the deposits, most of the distributions having been authorized more than seven years before the institution of the suit. The bank was a very large one, having proven deposits and claims of $333,173,379.40, a total of 544,630 claims having been proven. The number of claimants was reduced to 160,271 by the acquisition of a large group of small claims by a small group of large depositors.

The amount of dividend checks which for more than seven years the Receiver has been unable to deliver to claimants or which, if delivered, have not been cashed for seven years, is not known to appellant, as the Receiver has failed and refused to file reports with the State Board of Escheats as required by the Michigan law, but from oral statements of defendant's counsel it is believed to be in the neighborhood of $300,000.00.

In the absence of report giving the amounts of deposits and depositors' names where proven claims have been abandoned for more than seven years, the State is unable to proceed with administration of the estates of the disappeared persons or, in the alternative, to proceed by suit for collection as authorized by the statute.

The District Judge granted defendant Connolly's motion and dismissed plaintiff's petition without opinion.

The Circuit Court of Appeals affirmed the order of the District Court in an opinion, copy of which is appended. The decision was expressly based solely on the merits, the Court holding that application of the Michigan law would constitute an unlawful interference with the liquidation of a national bank, thus in substance determining that the Michigan statute is invalid as repugnant to the National Bank Law and in particular to Sec. 194 (Title 12, U. S. Code, Sec. 194; R. S. 5236):

> "From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated: and the remainder

of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

This point was urged by defendant Connolly in the District Court and Circuit Court of Appeals as ground for the dismissal of the petition in the District Court and the affirmance of such dismissal, in that the petition failed to state a cause of action if the Michigan law was invalid as repugnant to the federal statute.

There were other federal questions involved in the suit, such as the jurisdiction of the District Court over the subject matter and the right to bring suit against the Receiver. These issues were assumed by the Circuit Court of Appeals, but not decided, in favor of the plaintiff, and it is unnecessary to state them as a basis for the jurisdiction of the Supreme Court of the United States. The Court in its opinion referred to three earlier cases in the same Court, viz.:

Starr v. *O'Connor*, 118 F. 2, 548 (decided Mar. 14, 1941), certiorari denied 314 U. S. 695;

Rushton v. *Schram*, 143 F. 2, 554 (decided May 31, 1944);

Starr v. *Schram*, 143 F. 2, 561 (decided May 31, 1944).

These are not earlier opinions in the same case or opinions in companion cases. They are earlier cases involving different issues.

The first of the cases above mentioned involved the law of Michigan prior to its amendment in 1941, which the present case concerns.

The second two cases above cited relate to the Michigan statute now involved.

However, all three cases related to attempts of the then Attorney General of Michigan to apply escheat law to dor-

mant deposits in the First National Bank-Detroit in liquidation, *where the depositor had failed to present claim* and hence may not have been entitled to payment under Sec. 194 of the National Bank Law above quoted, requiring payment of liquidation dividends on such claims as may have been proved to the Comptroller's satisfaction or adjudicated in a court of competent jurisdiction, moneys otherwise payable on unproven claims perhaps being given to the augmentation of payments on proven claims by tontine right.

The present case relates solely to whether the Michigan escheat law, in its application to proven claims where the claimant after proving his claim has disappeared, is repugnant to this or other sections of the National Bank Law requiring ratable payment on proven claims with respect to which federal law does not purport to award money payable on such claims either to other claimants, the shareholders of the bank, or the United States.

The Circuit Court of Appeals recognized the difference between this suit and the former cases, but held that the difference afforded no logical basis for a declination to apply settled doctrine.

Substantial Question Involved

The amount involved in the suit is large. The case was decided on the merits. The Supreme Court of the United States has not heretofore decided the exact question, although it has decided that similar State escheat laws are not repugnant to the National Bank Law when applied to an operating national bank. *Anderson National Bank* v. *Luckett*, 321 U. S. 233.

The Supreme Court of the United States has likewise held an escheat law applicable to funds which under federal statute have been covered into the Treasury. *United States* v. *Klein*, 303 U. S. 276. The present case is the only

one which has applied contrary doctrine to proven deposits in a national bank in liquidation.

Solution of the problem of supposed clash between the National Bank Law and proper State escheat laws is a substantial one and important not only to the State of Michigan but to other States. Banks, whether State or national, are the largest source of escheatable funds. The United States has not passed any federal escheat law, the same being a subject reserved to the States. Large sums in the case of First National Bank-Detroit and many other national banks in liquidation now are and for many years have been in the Treasury of the United States awaiting payment on proven claims where the claimant has disappeared or died without known heirs, which sums, unless the National Bank Law conflicts, should be taken by the States where the banks were located for payment to the claimants, or the successors of the claimants, if they can be located by proper State judicial proceedings and publication of notice.

Cases Sustaining Jurisdiction

Cases believed to sustain the jurisdiction of the Supreme Court of the United States in appeals from a Circuit Court of Appeals where that Court has held a State statute to be invalid as repugnant to the Constitution, treaties or laws of the United States are *McCarrol, Commissioner of Revenues of Arkansas*, v. *Dixie Greyhound Lines, Inc.*, 309 U. S. 176; *New State Ice Company* v. *Liebman*, 285 U. S. 262; *People of the State of New York* v. *Latrobe*, 279 U. S. 421; *Republic Pictures Corp.* v. *Koppler*, 327 U. S. 757; *Keating* v. *Public National Bank*, 284 U. S. 587; *City of Richmond* v. *Deans*, 281 U. S. 704.

While the above cases were decided under Sec. 240 of the Judicial Code (Title 28, U. S. Code, Sec. 347) before its recent revision, the present section, as revised by the Act

of June 25, 1948 [Title 28, U. S. Code, Sec. 1254(2)], is substantially identical. See reviser's notes to revised Sec. 1254.

Alternate Certiorari Application

Appellant is also applying for certiorari with respect to the same judgment. He believes that the Supreme Court of the United States has jurisdiction over this appeal. If, however, in this he is mistaken, it is requested that writ of certiorari be granted. *Bradford Electric Light Co.* v. *Clapper*, 284 U. S. 221.

Respectfully submitted,

STEPHEN J. ROTH,
Attorney General;
EDMUND E. SHEPHERD,
Solicitor General;
ARCHIE C. FRASER,
Assistant Attorney General,
State Capitol,
Lansing 2, Michigan;
JULIUS H. AMBERG,
Special Assistant Attorney General,
500 Michigan Trust Building,
Grand Rapids 2, Michigan,
Attorneys for Appellant.

APPENDIX

Opinion Sought to Be Reviewed

No. 10615

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EUGENE F. BLACK, Attorney General, Successor to John R. Dethmers, Attorney General, in the Name and on Behalf of the People of the State of Michigan, *Appellant*,

v.

PRESTON DELANO, Comptroller of the Currency of the United States of America, and JOSEPH T. CONNOLLY, as Receiver of the First National Bank-Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency of the United States of America, *Appellees*

Appeal from the United States District Court for the Eastern District of Michigan

Decided November 30, 1948

Before Hicks, Chief Judge, Martin and McAllister, Circuit Judges

MARTIN, *Circuit Judge:*

Our appellate jurisdiction has been repeatedly invoked in litigation involving, in varying phases, the right of the State of Michigan to apply its statutes of escheat to deposits in the First National Bank-Detroit, a national bank in liquidation.

In *Starr, Attorney General v. O'Connor, Comptroller of the Currency*, 6 Cir., 118 F. (2d) 548 (decided March 14, 1941) certiorari denied 314 U. S. 695, we reviewed at length the state's escheat laws, construed relevant provisions thereof, and attempted to demonstrate from highest author-

ity that, while national banks are subject to state laws which do not interfere with the purposes of their creation, or tend to impair or destroy their efficiency as federal agencies, or conflict with the paramount law of the United States, the then existing Michigan escheat procedure constituted an unlawful interference with the liquidation of a national bank. We pointed to the decisions of the Supreme Court in *Cook County National Bank v. United States*, 107 U. S. 445, 448; *Davis v. Elmira Savings Bank*, 161 U. S. 445, and *First National Bank of San Jose v. State of California*, 262 U. S. 366.

After our opinion was promulgated, the legislature of Michigan amended the state laws of escheat by Act No. 170, Public Acts of 1941. In *Rushton, Att'y Gen. v. Schram*, 6 Cir., 143 F. (2d) 554 (decided May 31, 1944), we held that the amendatory act did not apply *retroactively* to dormant deposits in the insolvent First National Bank-Detroit. The majority opinion in that case assumed upon principles of comity that the state legislature had not intended to enact a law, effective retroactively, which would interfere with the complete system provided by Congress for winding up national banks and distributing their effects in a manner neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates.

We expressed the further presumption that the Michigan legislature had not designed to nullify the decision of this court in the *Starr* case, but had enacted a law intended to operate *prospectively* only. *Anderson National Bank v. Luckett*, 321 U. S. 233 (which was announced after the filing date of this court's opinion in *Starr, Att'y Gen. v. O'Connor, Comptroller of the Currency, supra*), was distinguished upon the ground that, there, the Supreme Court's adjudication related to the applicability of a state's laws of escheat to deposits in a *solvent and operating* national bank. One of our judges, however, based concurrence in the result reached upon the proposition that the Michigan amendatory act operated in the context as an unlawful interference with the liquidation of a national bank as provided for in Title 12, section 194, of the United States Code. The majority

opinion did not gainsay this, but attributed to the Michigan legislature no intended interference with the liquidation of the First National Bank-Detroit.

In *Starr, Att'y Gen. v. Schram*, 6 Cir., 143 F. (2d) 561 (decided on the same day, May 31, 1944), this court, in unanimity, affirmed the decree of the district court to the effect that the escheat statutes of Michigan, *including Act 170 of the Public Acts of Michigan for 1941*, constitute an unlawful interference with the liquidation of an insolvent national bank and are inapplicable to the receivership of the First National Bank-Detroit. The decree below was reversed in part, but not in respect to the clear-cut holding just stated.

The same statute, Act 170, is involved in the present litigation, which on its merits relates only to the attempt of the State of Michigan to apply its escheat laws to deposits where depositors have had their claims allowed by the receiver, the Comptroller of the Currency, or both, and have, since that time, either died, disappeared, failed to receive or to cash dividend checks issued to them.

Both defendants in the district court, Delano, Comptroller, and Connolly, Receiver, moved to dismiss the instant action. The Comptroller of the Currency, in his special appearance, combined his motion to dismiss with a motion to quash the service upon the ground that he could not, without his consent, be properly sued outside the District of Columbia. The motion of the receiver also challenged the jurisdiction of the district court for the eastern district of Michigan, and additionally pleaded no cause of action.

The district court granted both motions, as made. Assuming without deciding that the action was brought in the right district, we are of opinion that the judgment of dismissal should be affirmed on the merits. The present action brought by the State of Michigan to apply its laws of escheat in the circumstances related constitutes an unlawful interference with the liquidation of a national bank upon the same principles and authority fully discussed in our previous opinions. The valiant spirit displayed in continuing litigation by successive attorneys general of Michigan and able special counsel retained to aid them is commendable,

but we think their present battle is fought upon essentially the same legal grounds upon which former contests have been waged. The authorities which they now submit have been previously carefully considered and rejected as failing to sustain their major objective.

The fact that we encounter here proven claims rather than dormant deposits supplies no logical basis for a declination to apply settled doctrine. The order of dismissal is affirmed.

(1229)

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SUPREME COURT U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1279

No. 24

FEB 20 1969
CHARLES

STEPHEN J. ROTH, Attorney General, Successor to EUGENE F. BLACK, Attorney General, in the name and on behalf of the People of the State of Michigan,
Appellant,

vs.

PRESTON DELANO, Comptroller of the Currency of the United States of America, and

JOSEPH T. CONNOLLY, as Receiver of the First National Bank—Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency of the United States of America,
Appellee.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 566

STEPHEN J. ROTH, Attorney General, Successor to EUGENE F. BLACK, Attorney General, in the name and on behalf of the People of the State of Michigan,
Appellant,

vs.

PRESTON DELANO, Comptroller of the Currency of the United States of America, and

JOSEPH T. CONNOLLY, as Receiver of the First National Bank—Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency of the United States of America,
Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

PRIOR DECISIONS ARE NOT CONTROLLING

Appellant, in his jurisdictional statement filed pursuant to Rule 12, stated the nature of the case and rulings of the Court. Appellee has not controverted any fact thus stated, but has endeavored to imply facts not of record and to draw incorrect inferences from earlier cases in the Sixth Circuit in an effort to claim the present controversy is foreclosed by *res adjudicata*, a defense not

pleaded and in any event not material to the question of this Court's *jurisdiction* on appeal, which is the only question before this Court on the pending motion.

The first of the earlier cases, *Starr vs. O'Connor* (1941), 118 F. 2, 548 (*certiorari* denied 314 U. S. 695), related to a different escheat law of Michigan than the one presently involved. The case was tried on a stipulation of facts covering $1,799,097.66 of bank deposits "upon which no claims had been presented to and accepted by the receiver" (p. 550). *The instant case, on the contrary, relates solely to claims which the depositor filed and had allowed but where he could not later be located to receive dividend checks or, if he did receive the same, has not cashed them for seven years or more* (R. 5, 12-13). (References to the record are to the printed record in the court below filed with this appeal and also to the record in the alternative petition for certiorari pending in this Court, Docket No. 533). The decision in *Starr vs. O'Connor, supra*, was based (p. 566) on *First National Bank of San Jose vs. California*, 262 U. S. 366, on the ground that the then escheat law of Michigan contained provisions conflicting with the National Bank Law. This is the only case involving any Michigan escheat law which this Court has refused to review, the former escheat law of Michigan having contained provisions held unlawful in the *San Jose* case.

The next two cases in the Sixth Circuit, *Rushton vs. Schram*, 143 F. 2, 554, and *Starr vs. Schram*, 143 F. 2, 561, both decided May 31, 1944, did relate to the Michigan escheat law now involved, *but also solely to dormant deposits where no claim had been filed or allowed.* This difference the Court below recognized in the instant cause, stating (R. 101; 170 F. 2, 966, 968):

> "The fact that we encounter here proven claims rather than dormant deposits supplies no logical basis for a declination to apply settled doctrine."

That the court erred in its conclusion we shall later point out. What we now advert to is that the court recognized that a different fact situation existed in the instant cause from that previously passed upon and did not claim

(any more than appellee had) that the new question now involved was *res adjudicata*.

The pleadings in the prior cases made it clear that they concerned only unproven claims. Appellee does not assert otherwise.

When escheat is sought with respect to deposits where the depositor has never filed claim, it may well be argued that the State law does conflict with the National Bank Law (Title 12, U. S. Code, Sec. 194), which requires the Comptroller to "make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction", and which further requires that "the remainder of the proceeds, if any, shall be paid over to the shareholders" of the bank.

Thus a non-proven claim may be foreclosed and payments on proven claims thus augmented or, if a surplus results, the amount otherwise payable on an unproven claim may go to shareholders. This would be analogous to distribution in bankruptcy and equity receiverships. The National Bank Law, in the case of unproven claims, may thus decree a tontine right for the benefit of proven claims and shareholders and foreclose the State's right to succeed to unproven abandoned claims. This may be the correct basis for the decisions of the Court below in the earlier cases relating to unproven claims and one of the reasons for denial of *certiorari* in the only earlier case in which *certiorari* was sought. It was the basis of denying escheat with respect to unproven claims in the case of *In re Commercial National Bank*, 45 Fed. Supp. 482 (E.D. Pa.), affirmed on opinion below 134 F. 2, 172 (C. C. A. 3).

But, as we shall point out, there is no such tontine right prescribed whereby funds payable on proven claims later abandoned go to augment payments to other claimants or to shareholders.

Nevertheless, here the court below refused the State's right of succession to a proven claim, thus in effect permitting it to escheat to the United States, which has no authority over the escheat or other devolution of property. The question presented now is entirely different from the earlier cases below, which decisions are not binding on this Court in any event.

Appellee goes outside the record to imply that a settlement agreement was made pending petitions for *certiorari* in two of the earlier cases involving such different claims and, apparently, that the agreement settled matters not involved in the prior suits. The appellee made no such claim in his pleadings (R. 64-65). A similar statement filed by the appellee in the Court of Appeals was stricken from the record by that court "for the reason that it carries beyond the record in the case and contains argamentative matter not presented consistently with the rules of this court" (R. 97). Nevertheless, appellee attempts again thus to influence the Court on an extraneous matter not in evidence. There is no settlement agreement before the Court in this case and none which we believe has any bearing on the questions now before this Court.

THE STATE ACT WAS HELD INVALID

The sole question on the pending motion is whether appellant was "relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States" (Title 28, U. S. Code, Sec. 1254 (2) as revised).

That appellant was relying on a State statute, viz., the Michigan escheat law, is of course undenied. But appellee contends that the Court of Appeals merely held the statute inapplicable to a national bank in liquidation and not invalid as repugnant to the National Bank Law. Appellee is demonstrably in error.

Appellee repeatedly contended below that the Michigan statute was an unlawful intrusion upon the National Bank Law. To this the court below agreed, although, as we contend, erroneously. In the earlier case of *Rushton vs. Schram*, 143 F. 2, 554, two of the three judges did base their decision as to unproven claims on the ground that the Michigan statute was not retroactive to the seven year period prior to the bank failure, but the third (Simons, C. J.) based his decision on the invalidity of the Michigan statute as repugnant to the National Bank Law, stating (p. 561):

> "I think, however, that the amended Act, at least insofar as it permits the state administrator to exer

> cise powers of visitation and inquisition, and insofar as it imposes penalties upon an agency of the federal government in possession of the assets of an insolvent national bank, operates as an unlawful interference with the liquidation of a national bank provided for in Sec. 194, 12 U. S. C. A., of the National Banking Act. * * * I think the state is not empowered to interfere with it without the government's consent, clearly expressed in Congressional enactment."

The decision of the other two judges was contrary to *Evans Products Company vs. State Board*, 307 Mich. 506. Furthermore, it is not a retroactive application of the Michigan law in the present case of abandonment of proven claims to apply it to antecedent facts, i. e., part of the abandonment period after the claims were proved. *Cox vs. Hart*, 260 U. S. 427, 435. In *Provident Institution for Savings vs. Malone*, 221 U. S. 660, *Anderson National Bank vs. Luckett*, 321 U. S. 233, and *United States vs. Klein*, 303 U. S. 276, escheat laws passed or amended after all or a part of the dormancy period were held properly to embrace such prior periods.

The entire court, apparently recognizing that the reason assigned by Judge Simons was the only ground upon which the decision could be plausibly based, accordingly in *Starr vs. Schram*, 143 F. 2, 561, 562, held:

> "Upon conclusion of the hearing, the district court decreed that the escheat statutes of Michigan, including Act 170 of the Public Acts of Michigan for 1941, which was enacted subsequently to our decision in Starr v. O'Connor, supra, constitute an unlawful interference with the liquidation of an insolvent national bank, and are inapplicable to the receivership in the instant case. The district court's decree to this extent was correct."

The court below in the instant cause pointed out its prior unanimity on this ground (R. 99-100; 170 F. 2, 966, 967) and decided the instant cause expressly "on the merits", stating (R. 100; 170 F. 2, 967):

"The present action brought by the State of Michigan to apply its laws of escheat in the circumstances related constitutes an unlawful interference with the liquidation of a national bank upon the same principles and authority fully discussed in our previous opinions."

Appellee, in support of the alleged correctness of the decision below, cites *Davis vs. Elmira Savings Bank*, 161 U. S. 275, and *Easton vs. State of Iowa*, 188 U. S. 220, both of which held State laws invalid as repugnant to the National Bank Law. Therefore, appellee himself must believe that the decision below was a holding that the Michigan escheat law was invalid as repugnant to the federal law.

If the Michigan law did not "apply" to a national bank in liquidation, the court below could not have found that it constituted "an unlawful interference". It would merely have construed the law to be inapplicable. *An unlawful interference can occur only when a statute does apply but is invalid as repugnant to the federal law.* This is what the court below held and it is from such a holding that right of appeal to this Court is expressly granted by the statute. The court below did not point out, nor can there be discovered in the Michigan law, anything to make it "inapplicable" to a national bank in liquidation. Sec. 13a of the Michigan law (R. 33) provides for escheat to the State when a depositor has any moneys or credits in the possession or control of a depository where no dealings or transactions have been had with respect thereto between the depositor and the depository for seven years or more. Sec. 4b of the Michigan law (R. 20) defines "depository" to include "any person" and defines "person" to include, among other things, a bank and *any* governmental official, receiver, fiduciary or liquidating officer. The statute therefore applies to a national bank in liquidation, but was erroneously held below to be invalid in so doing as repugnant to the National Bank Law.

Appellee's references to cases dealing with appeals from State courts have no bearing on the present appeal. Appeal in such case is available where a State statute is held valid after its validity "is drawn in question" by

the future *appellant* "on the ground of its being repugnant to the Constitution, treaties or laws of the United States" (Title 28, U. S. Code, Sec. 1257(2) as revised). The entire burden is thus upon the appellant; and it has long been the rule that he must clearly raise the issue of validity below and obtain a decision thereon.

An appeal from a Court of Appeals, however, is available to one who has brought an action relying on a State statute, which statute is held repugnant to the Constitution, treaties or laws of the United States (Sec. 1254(2) as revised). Appellant here sought a declaration that the Michigan escheat law applied to a national bank in liquidation and that the appellee was subject to and bound by the law (R. 15). This presented squarely the question of whether the statute was valid State legislation. Appellee claims that he at no time raised the issue of validity of the escheat law. As a matter of fact he claimed below that the State law was an invalid intrusion upon the National Bank Law. But if appellee had not so claimed, this would be irrelevant. If the right to appeal is to rest upon issues raised by the *appellee* and within his power to phrase as he pleases, the appellant's statutory right becomes a nullity. The holding of the Court of Appeals is the sole determining factor under Sec. 1254(2), whether that holding is of the court's own motion or in response to appellee's contention.

The cases cited by appellee with respect to appeals from State courts, even if applicable to the present situation, do not support the contention that appeal will not lie from a State court when a statute is sustained, although attacked because it infringes federal rights. *Charleston Federal Savings & Loan Association vs. Alderson*, 324 U. S. 182; *Memphis Natural Gas Co. vs. Beeler*, 315 U. S. 649; and *Baltimore National Bank vs. Tax Commission*, 296 U. S. 538, are cases where the appellant did not timely contend explicitly below that the statute was invalid, or where administration of the statute was attacked and not the validity of the statute itself. Of course, when the validity of the statute was properly "drawn in question" because of its interference with federal rights, this Court does grant appeals from State courts, as required by the statute. *Lawrence vs. State Tax Commission*, 286 U. S.

276; *State Farm Mutual Ins. Co. vs. Duel*, 324 U. S. 154; *Chassaniol vs. Greenwood*, 291 U. S. 584; *Senn vs. Tile Layers Protective Union*, 301 U. S. 468; *Richfield Oil Corp. vs. State Board*, 329 U. S. 69. The right of appeal accrues when there was properly "drawn in question" a particular unconstitutional application of the State statute rather than the validity of the statute as a whole. *Dahnke-Walker Co. vs. Bondurant*, 257 U. S. 282; *Furst vs. Brewster*, 282 U. S. 493. See also *Fleming vs. Rhodes*, 331 U. S. 100, 103, 108.

Appellee's contention is equally unfounded when he claims that appeals do not lie from a court of appeals where a State statute is held not to be validly applicable because the application would infringe federal rights. Appellee criticizes the cases cited by us in our jurisdictional statement on the ground that in such cases it was held that the State had no power to enact the legislation in question because of federal constitutional prohibition. But that is precisely what happened in the instant cause when the court held the escheat law to be an unlawful interference with liquidation of a national bank under Sec. 194 of the National Bank Law, this being, according to Judge Simons' statement in the earlier case of *Rushton vs. Schram*, 143 F. 2, 554, 561, a thing the State is "not empowered" to do. "*Applicability*" *is the* sine qua non *of "unlawful interference". If the State law was inapplicable, there would have been no interference, unlawful or otherwise.*

While the court below did not hold that Michigan could not enact an escheat law, it did hold that it had no power to enact such a law as applicable to a national bank in liquidation. It is not necessary, however, to hold a statute valid if it is found not to be invalid *in toto*. A statute may be invalid as applied to one state of facts and yet valid as applied to another. *Dahnke-Walker Co. vs. Bondurant*, 257 U. S. 282; *Poindexter vs. Greenhow*, 114 U. S. 270; *St. Louis, etc., Ry. Co. vs. Wynne*, 224 U. S. 354.

Gamble vs. Daniel, 281 U. S. 705 (from 30 F. 2. 447), cited by appellee, does not sustain his position. The holding below did not declare invalid a State insolvency law, but decided merely that upon bankruptcy the State liquidator was properly required to turn over assets to

the bankruptcy trustee. The State law did not provide otherwise. In *Reeves vs. Williamson*, 317 U. S. 593 (from 127 F. 2, 657), also cited by appellee, the holding below did not invalidate the Kentucky tax statute, but merely its attempted administrative application to postal savings not expressly covered by the statute. In the instant cause, the Michigan escheat law expressly covered all banks and receivers thereof, but was erroneously held invalid because of its alleged interference with national banks. When validity of the same Kentucky statute was drawn in question in a case where, by its terms, the law applied to out-state deposits, this Court did allow an appeal. *Madden vs. Kentucky*, 309 U. S. 83.

In any event, cases of appeal from Courts of Appeal decided before the Act of June 25, 1948, are no longer completely controlling. *Congress has enlarged the right of appeal from such courts.* Prior to the recent revision, Sec. 240 (b) of the Judicial Code (28 U. S. Code, Sec. 347) confined the right of appeal to cases where the validity of the State statute "is drawn in question", the same words used with respect to appeals from State courts. But as revised in the present Sec. 1254(2), the requirement for appeal is merely that the State statute relied on be held to be invalid under federal law. It is no longer material whether such validity "was drawn in question" by the appellee. Thus *an appellee* can no longer seek to prevent an appeal by the way he phrases his pleading. The sole criterion is the holding of the Court of Appeals.

Nor is appellee correct in his reliance upon *P. J. Carlin Construction Co. vs. Heaney*, 298 U. S. 637, *Bradford Electric Light Co. vs. Clapper*, 284 U. S. 221, and *North Dakota vs. Olson*, 280 U. S. 528, in support of the contention that the instant cause involves merely the question of which of two statutes applies. There was no real conflict between the statutes in the cited cases. But in the instant cause there was found to be a direct clash, in that the one was held "unlawfully to interfere" with the other. This case is precisely like *RFC vs. Beaver County*, 328 U. S. 204, where this Court denied a motion to dismiss appeal in a case where the application of a Pennsylvania tax statute was claimed to conflict with the RFC statute. This case is directly controlling here.

THE NECESSARY PARTY IS BEFORE THE COURT

Appellee claims that an alleged necessary party, the Comptroller of the Currency, is not before the Court. This is an abrupt about face by appellee, the Comptroller in an earlier case having obtained his dismissal because he was an unnecessary party. The Court of Appeals stated in *Starr vs. O'Connor*, 118 F. 2, 548, 550:

> "The attorney general of Michigan filed the suit on behalf of the state against the receiver of the First National Bank — Detroit and the Comptroller of the Currency of the United States, the latter of whom was dismissed on motion as an unnecessary party."

This playing fast and loose with the courts avails appellee nothing. The claim is based on the contention (R. 64-65) that suit could not be brought against the receiver alone because, under Sections 192 and 194 of the National Bank Law, the receiver pays the money to the Comptroller and the latter pays the dividend. But a long line of decisions has sustained suits against receivers with respect to claims against national banks, even though the Comptroller is not a party and is the one who pays the dividend. *Case vs. Bank*, 100 U. S. 446; *Armstrong vs. American Exchange National Bank*, 133 U. S. 433; *Earle vs. Conway*, 178 U. S. 456; *Merrill vs. National Bank of Jacksonville*, 75 Fed. 148 (C. C. A. 5), affirmed without discussing the point, 173 U. S. 131; *American Surety Company vs. Bethlehem National Bank*, 314 U. S. 314. As stated in *Taylor vs. Spurway*, 72 F. 2, 97, 99 (C. C. A. 5):

> "If it should transpire that the receiver has no funds to respond to a judgment, it must be assumed that the Comptroller, although beyond the reach of process of the court rendering the judgment, will give effect to a valid judgment of a court of competent jurisdiction. *Earle v. Pennsylvania*, 178 U. S. 449."

The fact that funds payable to bondholders had been covered into the Treasury was held in *United States vs. Klein*, 303 U. S. 276, not to deprive the state court of

jurisdiction to declare such funds escheated under the Pennsylvania escheat statute.

Under the above decisions, the bank receiver is accountable to claimants. He is also accountable to the Comptroller. By Sec. 6 of the Michigan law (R. 21), escheat reports are required from "depositories indebted or accountable to any other person." The Michigan statute covers the situation squarely. The court below did not imply the contrary.

Nor does the fact that the appellee claimed the receivership was closed make any difference. He was alleged to have been appointed and to be acting as receiver (R. 3-4), which averment was admitted by defendant's motion to dismiss. Although in an affidavit annexed to the motion appellee claimed that the receivership was "deemed technically closed" (R. 70), the same affidavit discloses (R. 72) that defendant Connolly was given a commission as receiver "to act in such incidental cases that might require action by a receiver". This is one of such cases. Furthermore, after the institution of suit *the receiver as such* entered into a stipulation permitting him to send records to the Comptroller without prejudice to the issues involved (R. 48).

THE DECISION BELOW IS ERRONEOUS

We had wished not to argue the errors of the court below, when the sole question before the Court now is one of jurisdiction. But, appellee having done so, we shall cover the matter briefly.

In the prior cases involving unproven claims, the Court of Appeals' decisions may have been correct if the statute gives a tontine right whereby proven claims profit from dividends which would have been payable on unproven claims. But Sec. 194 of the National Bank Law does not prescribe a tontine right whereby funds payable on proven claims, later abandoned, go to augment payments to other claimants or to shareholders. Cf. *Provident Institution for Savings vs. Malone*, 221 U. S. 660, 665, and *Security Savings Bank vs. California*, 263 U. S. 282, 286. Payments, by the law, must be made ratably on proven

claims. *Merrill vs. National Bank of Jacksonville*, 173 U. S. 131, 143; *American Surety Co. vs. Bethlehem National Bank*, 314 U. S. 314, 317. The appellee has never claimed otherwise, but merely that such money must be held indefinitely in the United States Treasury until the claimant appears, if ever, the United States keeping the same if the claimant never appears. No federal law provides for court proceedings and publication of notice to locate a disappeared claimant or his successors.

The National Bank Law (Sec. 194) requires payment on proven *claims*, not necessarily to the *claimant*. Thus a successor to an original claimant, by assignment, attachment, subrogation, or administration of his estate, is held entitled to stand in the original depositor's shoes. *Earle vs. Conway*, 178 U. S. 456 (attachment of deposit in insolvent national bank); *American Surety Co. vs. Bethlehem National Bank*, 314 U. S. 314 (subrogation to depositor in insolvent national bank); see also *Provident Institution for Savings vs. Malone*, 221 U. S. 660, 665, and *Anderson National Bank vs. Luckett*, 321 U. S. 233, 252.

The State has sole power over abandoned property just as it does over other transfers and devolution of property (*Anderson National Bank vs. Luckett*, 321 U. S. 233, 240-241, 248) and hence proper escheat laws apply to banks, whether State or national. *Provident Institution for Savings vs. Malone, supra; Anderson National Bank vs. Luckett, supra; Security Savings Bank vs. California, supra.*

Nor does the fact that insolvent national bank funds are paid to the Comptroller and by him covered into the Treasury (Sec. 192 of the National Bank Law) mean that the escheat law is repugnant to the federal law. In *United States vs. Klein*, 303 U. S. 276, the Pennsylvania escheat law was held applicable to funds deposited in a federal court suit, although the same had been covered into the Treasury as required by federal statute.

No valid reason exists, or was even suggested by the court below, why the Michigan escheat law, in the case of a proven claim, should not apply to national banks, whether closed or open, as this Court has held subrogation, attachment, and other assignment and devolution to apply, or in what respect the same would be repugnant to the

National Bank Law. The Michigan law does not infringe the National Bank Law, but is impartial, applying to all banks and other depositories without discrimination as to national banks. The bank and its receiver should perform their duty and pay the abandoned deposits to the State of Michigan, to be held for the depositors or their successors if ascertained. Cf. *Anderson National Bank vs. Luckett*, 321 U. S. 233, 248-249, 252.

The cases permitting application of State escheat laws to national banks are merely examples of the general principle that such banks are subject to State laws which do not interfere with the purposes of their creation or tend to impair their efficiency as federal agencies. *National Bank vs. Commonwealth*, 9 Wall. 353; *McClellan vs. Chipman*, 164 U. S. 347; *First National Bank vs. Missouri*, 263 U. S. 640, 656.

To apply State escheat laws to proven claims later abandoned, whereby the State as successor to the claimant holds the money for the owner if found, interferes neither with the purposes nor the efficiency of national banks. It merely prevents the United States Treasury from keeping indefinitely money it admittedly owes proven claimants, which the United States has no power to escheat.

THE CASE INVOLVES A SUBSTANTIAL QUESTION

Appellee denies neither the large amount here involved nor the increasing importance of escheat laws, particularly in relation to banks and banks in liquidation.

But appellee claims that Michigan has since passed a new escheat law, although with a saving clause keeping the law here involved applicable to pending suits. But appellee does not and cannot point out wherein the new Michigan law differs as to questions here involved. Both laws have all the safeguards approved in *Anderson National Bank vs. Luckett*, 321 U. S. 233, and *Security Savings Bank vs. California*, 263 U. S. 282. No question of due process of law has been or can validly be raised against either statute, the depositor or his successor being given the right *at any time* to obtain the money from the State (Sec. 22; R. 36-37).

It is not correct that this Court, if it determines the Michigan law not to be invalid as repugnant to federal law, cannot decide the remaining minor questions, such as that suit may be properly maintained against the receiver. The minor questions are also federal questions and on an appeal the scope of review given this Court by Sec. 1254(2) covers all federal questions presented, not merely the question of validity.

A decision of this Court will settle, not only for Michigan but for other States having valid escheat laws, the question of whether national banks in liquidation must comply with such laws relating to proven claims, just as those not in liquidation are required to do, or whether the federal government may in effect escheat money to itself, although that Government has no power over escheats or other devolution of property and has no proceedings for administration of estates and court advertisement in order to locate the claimants. It is time that the doctrine asserted by the Court of Appeals be reviewed here and reversed, inasmuch as it is contrary to the settled doctrine of this Court as to the validity of State laws applying to national banks which do not interfere with the purposes or efficiency of the banks.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. 24

STEPHEN J. ROTH, Attorney General of the State of Michigan, etc.,

Appellant,

vs.

PRESTON DELANO, Comptroller of the Currency of the United States of America, et al.,

Appellees.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR APPELLANT

OPINION BELOW

The opinion below in the Court of Appeals for the Sixth Circuit, filed November 30, 1948 *(sub nom. Black v. Delano)*, is reported in 170 F. 2d 966. It is contained in the Record (66-68). There was no opinion filed in the District Court.

GROUND ON WHICH JURISDICTION IS INVOKED

Jurisdiction of this Court upon appeal is invoked under Title 28, U. S. Code, Sec. 1254(2), as revised by the Act of June 25, 1948, 62 Stat. 869-992, which provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> • • • • •
>
> "(2) By appeal by a party relying on a state statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented; • • •."

Petition of the Attorney General of Michigan was filed June 25, 1946, in the United States District Court for the Eastern District of Michigan, Southern Division, for a declaratory judgment and other relief, pursuant to Sec. 274-d of the then Judicial Code, now in substance Title 28, U. S. Code, Sections 2201-2202 as revised (R. 3-15). The petition prayed that the Michigan law relating to escheatable and abandoned property, as amended by Act No. 170 of the Public Acts of Michigan for 1941, be applied to deposits in First National Bank—Detroit in liquidation, where the depositors' claims have been proven but thereafter for seven years or more the depositors could not be located to receive dividend checks or, if they did receive the same, have failed to cash them.

The Michigan escheat law appears in the record (15-31) and will later be more specifically detailed.

Appellee Connolly, Receiver of the bank, appeared generally as such (R. 37) and moved to dismiss (R. 48-49), among other reasons because the petition failed to state a cause of action; and he relied on Sections 192, 193 and 194 of Title 12, U. S. Code (the National Bank Act), set out in the appendix hereto. The District Court granted the motion and dismissed the case (R. 58).

On appeal the Court of Appeals affirmed (R. 66) and in its opinion stated (R. 68):

> "The present action brought by the State of Michigan to apply its laws of escheat in the circumstances related constitutes an unlawful interference with the liquidation of a national bank upon the same principles and authority fully discussed in our former opinions. • • • The fact that we encounter here proven claims rather than dormant deposits supplies no logical basis for a declination to apply settled doctrine."

Appellate jurisdiction is invoked under the statute above quoted because the court below thus held a State statute (the Michigan escheat law) "invalid as repugnant to the Constitution, treaties or laws of the United States" (the National Bank Law). This Court on March 28, 1949, having postponed the question of jurisdiction to hearing on the merits (R. 76-77), the jurisdictional question will be discussed in the ensuing argument.

STATEMENT OF CASE

The facts are not in dispute, being admitted by Receiver Connolly's motion to dismiss and, in so far as we believe material, also by an affidavit filed by him in support thereof (R. 49-54).

Preston Delano, Comptroller of the Currency, was also originally a defendant (R. 3). He moved to dismiss because he was not a resident of the district (R. 46-47). The motion was granted (R. 58). As no error has been assigned with respect to such dismissal, he is no longer in the case.

The following facts appear in the petition in the District Court:

Appellee Connolly is the present Receiver of First National Bank—Detroit, a national banking association, and is also the Detroit Representative of the Comptroller of the Currency (R. 3).

First National Bank—Detroit has its principal place of business in the City of Detroit, in the Eastern District of Michigan, Southern Division (R. 4). On February 11, 1933, it closed its doors and did not thereafter resume the conduct of normal banking business (R. 4).

On May 11, 1933, the Comptroller, having found the bank to be insolvent and unable to pay its debts, appointed C. O. Thomas Receiver of the bank. Thomas resigned August 15, 1934, when he was succeeded as Receiver by B. C. Schram. Schram remained as Receiver until his resignation June 15, 1944, when appellee Joseph T. Connolly was appointed Receiver (R. 4-5).

Since June 15, 1944, appellee Connolly has been and is the duly appointed, qualified and acting Receiver of the bank (R. 5).

Appellee Connolly and his predecessors gave notice to claimants to present their claims as set forth in the National Bank Act (R. 5). A majority of the creditors and depositors presented proofs of claim, which proofs of claim were adjudicated and proved as valid claims against the bank (R. 5).

As assets of the bank were collected and liquidated by Connolly or his predecessors, dividends were declared and made payable to such claimants as had filed proofs of claim which had been approved. Up to the time of the filing of the petition in the court below, 100% of the principal of such claims had been made payable to the claimants, and also an interest payment of 7.565% of the principal. The dividends were at various dates from April 12, 1933, to December 7, 1942 (R. 5-6).

The appellee Receiver, or his predecessors, issued dividend checks from time to time as the dividends were declared, but a great number of the checks were returned unclaimed, could not be delivered to the persons entitled thereto, or were delivered to the persons entitled thereto but were not presented for payment by such persons, which checks, or the funds allocated for the payment thereof, now remain in the possession and under the control of the appellee Receiver or the Comptroller of the Currency (R. 6).

The petition sets forth the requirement of the Michigan escheat law, placing upon each depository, as defined in the Act, the duty to make a report to the State Board of Escheats, the report to contain the names of the persons entitled to unclaimed, uncalled for or abandoned money,

securities, credits or property of any kind, where there have been no dealings with the depository in relation to such property within a period of seven years or more prior to the date of the report (R. 7). The petition (R. 7-11) made reference to a number of other provisions of the Michigan statutes in effect at the time the petition was filed. The statute will be discussed in our subsequent argument.

On June 26, 1946, demand was made upon appellee Connolly, Receiver, by the Michigan State Board of Escheats (R. 11, 32), requiring him to furnish a report of all those accounts wherein dividend checks were issued to those persons who had previously filed proofs of claim approved by the Receiver and the Comptroller of the Currency, and which dividend checks were either unclaimed by or not delivered to the persons entitled thereto, or which checks were delivered to such persons but were not subsequently presented for payment (R. 11).

Funds segregated and set apart for the payment of such unpaid dividend checks, together with the unclaimed or undelivered checks, were in the possession or under the control of the Receiver and the Comptroller of the Currency (R. 11). The demand for the report was confined to the checks and funds concerning which no dealings or transactions had been had between the Receiver or the Comptroller and the persons entitled thereto, their heirs, devisees, legatees or assigns, since the time of issuance thereof or for a period of seven years or more last past (R. 11).

The petition averred that, although it was the duty of the Receiver and his predecessors to make the reports required by law with respect to such dividend checks and funds, the Receiver and his predecessors had neglected to file the reports, to the irreparable harm and loss of the

owners of the dividends, their heirs, devisees, legatees and assigns, and the people of the State of Michigan and the primary school system thereof (R. 11-12).

The Receiver, pursuant to direction of the Comptroller of the Currency, was about to remove, as of June 30, 1946, all the abandoned and undelivered dividend checks, together with the funds for the payment of those checks which had been delivered but not presented for payment, out of the jurisdiction of the District Court and to the office of the Comptroller of the Currency in Washington (R. 12). The receiver was also about to remove to Washington the books, records, files, proofs of claim and all other things pertaining to such checks (R. 12). The petition further asserted that such removal would be in violation of the terms and provisions of the statutes of Michigan and would place the property beyond the territorial limits of the State and beyond its process, to the irreparable harm and injury of the owners of the dividends, their heirs, legatees, devisees and assigns, and the people of the State (R. 13).

The liquidation of the bank has been completed and the dividend checks and funds above mentioned represent a separate and distinct segregation of property belonging to the owners, their heirs, devisees, legatees, and assigns, based upon valid proofs of claim filed with the Receiver and in which the State of Michigan, under its escheat laws, has an interest (R. 13).

The petition prayed (R. 13-14) that the court take jurisdiction and declare that the escheat statute of Michigan, as amended, is applicable to First National Bank—Detroit, in liquidation, and that the defendants are subject to and bound by the provisions of such law. The petition also prayed for an injunction during the pendency of the suit, enjoining the defendants from removing the unclaimed, un-

delivered, uncalled for or abandoned dividend checks or the funds segregated for the payment of the dividend checks which had been delivered but not presented, and from removing books, records, files, proofs of claim and allied papers pertaining thereto, from the jurisdiction of the court and out of the State of Michigan (R. 14).

Judge Lederle, on the day the petition was filed, entered an order to show cause, with a restraining order as prayed (R. 35-36).

On the same day as the appearance of appellee Connolly, a stipulation was entered into between the Attorney General and the appellee as Receiver of the bank and Detroit Representative of the Comptroller of the Currency (R. 38-40). This stipulation recited that the books, records, files, etc., of the receivership are about to be removed to Washington and that the subject matter of this suit is included and commingled therein, and that to separate and segregate the latter from all the books, records and files would unduly delay such removal. It was thereupon agreed that Connolly might ship all of his records in his possession in Detroit to the United States Treasury Department, there to be delivered to the Custodian of the National Archives of the United States, where such records will be preserved and maintained. It was further agreed that appellee, or his successor in office, will, pursuant to the order of the court, return to the jurisdiction of the court any and all such records as are requested in the court order, and that the defendant would raise no jurisdictional issue or controversy in the cause because of the fact that such records are not within the jurisdiction. This stipulation further agreed that there are presently six commercial deposit accounts maintained in National Bank of Detroit, Detroit, Michigan, known as "Comptroller of the Currency for the benefit of the creditors of the First National Bank—Detroit,

Dividend Account No. 1, 2, 3, 4, 5 and 6"; and that none of the funds in such accounts would be withdrawn by the Comptroller or appellee Connolly pending final disposition of the case, except that National Bank of Detroit may honor all issued and outstanding dividend checks drawn on the accounts, when properly presented for payment, and except that the Comptroller of the Currency may draw on said accounts and may deliver dividend checks drawn thereon to such persons as may present themselves with satisfactory proof of their being entitled thereto. The stipulation provided for the dissolution of the temporary restraining order of June 25, 1946, and the dismissal of the order to show cause; and an order was entered accordingly on June 28, 1946 (R. 40).

As the appellee failed and refused to file report, as required by the Michigan escheat law, we do not know the amount of declared dividends unpaid on proven claims; but, from oral statements of the counsel for appellee in the Court of Appeals, it is believed to be in the neighborhood of $300,000.00.

On August 13, 1946, appellee filed the motion to dismiss above mentioned (R. 48-49), and on February 3, 1946, filed in support thereof an affidavit of R. B. McCandless, Acting Deputy Comptroller of the Currency (R. 49-54).

The affidavit gives more detail as to the declaration and payment of dividends, indicating that 544,630 claims were originally proven against the bank, aggregating $333,173,379.40 (R. 50). It was asserted (R. 53) that upon the accounting of Schram, the predecessor Receiver, June 15, 1944, "the receivership was deemed technically closed", although appellee Connolly "was given a commission as Receiver to act in such incidental cases that may require action by a Receiver". No denial was made of the aver

ments of the petition that appellee was appointed Receiver June 15, 1944, and has been and now is the duly appointed and acting Receiver of the bank (R. 5), nor was it claimed that the Receiver had been discharged. It was claimed in the affidavit that appellee Connolly's duties as to books, records and checks were being performed by him as an employee of the Comptroller and not as Receiver (R. 53). Connolly, however, in his motion to dismiss, claims he is not a properly appointed or authorized agent or representative of the Comptroller (R. 48-49).

SPECIFICATION OF ERRORS

Appellant intends to urge all his assigned errors (R. 71-73). They may be summarized or condensed as follows: That the Court of Appeals erred:

(a) In not adjudging that the Michigan escheat law is valid and applicable to First National Bank—Detroit in liquidation, and that appellee, as Receiver thereof and as Representative of the Comptroller, is bound by the Michigan law with respect to proven deposits in the bank; and in holding, on the contrary, that the Michigan law, if applied to proven claims of depositors, constitutes an unlawful interference with the liquidation of the bank and is invalid as repugnant to the National Bank Law and in particular to Sec. 194 thereof (Title 12, U. S. Code, Sec. 194; R.S. 5236).

(b) In not holding (although assuming) that the District Court had jurisdiction over the subject matter.

(c) In not holding (although assuming) that appellee Connolly is Receiver of the bank and is subject to this suit, properly brought against him.

SUMMARY OF ARGUMENT

1. Jurisdiction. The Court has jurisdiction under Title 28, U. S. Code, Sec. 1254(2), as revised, because the Michigan escheat law, which applies without discrimination to all banks in the State and receivers thereof, was held by the Court of Appeals invalid as repugnant to the National Bank Law in the case of proven claims against a national bank in liquidation where the Receiver of the bank had been unable to effect payment to the claimants for seven years or more.

The case is not moot by reason of any change in the Michigan law.

No settlement agreement appears of record or was made in fact, affecting the present case.

An important and substantial question is involved.

2. Alternate certiorari. If appeal does not lie, certiorari should be granted in Docket No. 21 and the case decided.

3. Michigan escheat law not invalid as repugnant to federal law. The Michigan law is not invalid as repugnant to the National Bank Law in its application to proven claims against a national bank in liquidation.

This is not the case of attempted escheat with respect to unproven claims where moneys which would have been payable on such claims if proved may go by tontine right to augment payment on proven claims or, if a surplus results, may go to shareholders.

The State properly succeeds to proven claims abandoned by the claimants. The United States has no power to es-

cheat property to itself, and State law, in governing escheat of proven claims, properly provides for succession thereto just as State law governs other devolution of property.

It has been held by this Court (*Anderson National Bank v. Luckett*, 321 U. S. 233) that escheat laws do not unlawfully interfere with operating national banks. *A fortiori* they are not invalid as repugnant to the National Bank Law in the case of a bank in liquidation.

The case comes within the general rule holding State laws lawfully applicable to national banks when the laws are not contrary to the provisions of the federal law and do not interfere with the functions and purposes of the banks.

The Michigan statute complies with the requirements of due process.

The question is not *res adjudicata* by reason of earlier cases in the Court of Appeals which related to the different subject of the right of the State to effect escheat of dormant claims which the depositors never proved.

4. Other federal questions. The other questions involved, assumed in the Court of Appeals in appellant's favor, should be so decided.

The District Court where the bank was located had jurisdiction of the subject matter.

The Receiver, who is the only necessary and proper party, is before the Court and was properly sued. He has not been discharged, nor is the receivership closed.

This is not a case against the United States, which has no power to escheat money to itself and which admits liability to pay the money to proven claimants.

ARGUMENT

I

The Court Has Jurisdiction of This Appeal.

The question of jurisdiction has been postponed to the hearing on the merits (R. 76-77). While our contentions are contained in our previously printed Statement as to Jurisdiction and Brief in Opposition to Motion to Dismiss or Affirm, we shall, for the convenience of the Court, repeat the substance of the argument here.

A. The Michigan statute. The statute of the State of Michigan the validity of which is involved is the Michigan law relating to escheatable and abandoned property, being Act 238 of the Public Acts of Michigan for the year 1897 and amendments thereof, being Sections 13,455 to 13,477, both inclusive, of the Compiled Laws of Michigan for 1929 (Vol. 3, p. 4814), and Mason's Supplement of 1940 (p. 1431), as amended by Act 170 of the Public Acts of Michigan for 1941 (p. 245).

The Michigan Constitution of 1908, Article VI, Sec. 20, creates a State Board of Escheats, composed of the Secretary of State, the State Treasurer and the Commissioner of the State Land Office (Vol. 1, Comp. Laws of Mich. 1929, p. 216).

The pertinent provisions of the statute are printed in the Record (15-31) and summarized in our Statement as to Jurisdiction (pp. 2-7). Inasmuch as the Court of Appeals held the Michigan law invalid on the broad ground that a State escheat law interferes with the liquidation of a national bank under the federal statute rather than because of any particular provision of the Michigan law, we shall

merely present the structural outline of the Michigan statute, quoting those parts showing its express application, among other things, to a bank in liquidation and the receiver thereof.

Sec. 13a of the escheat law (R. 27) provides:

> "If any depositor, as hereinbefore defined, who or which has any money, credits, securities or property of any kind which is in the possession or under the control of any depository, doing business, located or operating within this state, where no dealings or transactions have been had with respect to any such property between such depositor and the depository having possession or control of such property for a period of 7 years or more, such depositor shall be presumed to have abandoned such property, and such property shall escheat to this state."

Sec. 4b of the law (R. 17) provides:

> "The words 'person' or 'persons' as used in this act shall be understood and interpreted to mean and include a natural person, a copartnership, a company, an association, a bank, a trust company, a corporation, except municipal corporations, or any officer thereof, any governmental department, agency, instrumentality or official, a depository, a receiver, a trustee, a fiduciary, a debtor, a custodian, a liquidating officer, or any combination of natural persons.
>
> "The words 'depositor' or 'depositors' as used in this act shall be understood and interpreted to mean and include any person, or persons, as above defined, who or which is the legal or equitable owner or creditor entitled to the possession of any property, real, personal or mixed, including liquidated choses in action,

which is in the possession or under the control of any other person, as above defined, who or which is indebted or accountable for any such property to such depositor.

"The word 'deposit' as used in this act shall be understood and interpreted to mean and include money, credits, securities, liquidated choses in action and property of any kind or nature.

"The word 'depository' as used in this act shall be understood and interpreted to mean and include any persor, as above defined, who or which has in his or its possession or under its control any property, real, personal or mixed, including liquidated choses in action, for which he or it is indebted or accountable to any other person as depositor."

Sec. 6 (R. 18) provides:

"On the thirtieth day of June in every year after the taking effect of this act, it shall be the duty of each person within this state, who or which as a depository is indebted or accountable to any other person for money, credits, securities or property of any kind to make a report * * * to the State Board of Escheats * * *, where no dealings or transactions have been had between the depositor and the depository with respect to any money, credits, securities or property of any kind for a period of 7 years or more * * *."

The State Board and the Attorney General are given the power to demand such reports (Sec. 6a; R. 19), a penalty of $300.00 plus $10.00 a day for delay being placed upon those failing to make report after demand (Sec. 7; R. 20). The Attorney General has the duty to file a bill in chancery to compel reports (Sec. 9; R. 21).

Sec. 9a (R. 22) subjects to escheat, in the case of a depository operating within the State whose business is being liquidated, any money or credits belonging to a depositor for which no claim has been filed or for which no demand has been made, where no dealings were had with the depository or with the receiver, custodian or liquidating agent for a period of seven years; and authorizes the Attorney General to intervene in behalf of the People of the State or to institute suit to have such property decreed to be escheated to the State. The Attorney General is also authorized to file claims with the receiver, custodian or liquidating agent, dividends thereon to be paid to the State Board.

Two alternate methods are provided for the collection and administering of escheatable funds.

Sec. 9b (R. 23) provides that, where money, credits, etc., have been unclaimed or uncalled for or abandoned for a period of seven years or more by the depositor, the Attorney General, in the name of the People of the State, may institute suit in the Circuit Court, in Chancery, to escheat the same, in which suit the depository and the depositors shall be made parties defendant. The section requires that personal service shall be made upon the depositories and upon the depositors, if they be found, and, if not, that they be served by publication for six successive weeks in a newspaper printed and published in the county. The court at the hearing is directed, upon a finding that the property has been abandoned, to decree the property escheated or transferred to the State and to direct that the same be paid to the State Board of Escheats.

Sec. 10 (R. 24) provides an alternative method in the case of a depositor whose identity is unknown or where the depositor has had no dealings or transactions in regard to

the property within seven years, and where there is good reason to believe that the depositor is dead. In such case the Attorney General, or the State Public Administrator, is given the duty to take proceedings to have an administrator appointed in the proper Probate Court to administer upon the estate of such missing depositor as a deceased person.

The administrator, upon giving bond, is given the right and duty to demand and receive from the depository deposits of the missing depositor, the administrator being also given rights of action to reduce the same to possession and control as administrator. The section further provides that, if there are no known heirs, legatees, devisees or assigns of the missing depositor, then, upon the allowance of the administrator's final report and accounting, the administrator shall assign the property or funds to the State Board of Escheats.

Sec. 10a (R. 24-25) provides that, in case there are no known heirs, legatees, devisees or assigns of a depositor, it shall be sufficient proof for the purposes of escheat when it appears from reliable sources and the books and records of the depository that the disappeared or missing depositor has had no dealings or transactions with the depository for a continuous period of seven years, but it is provided that, within thirty days after the granting of administration, notice of the granting of administration shall be published in the form of similar notices in the administration of the estates of deceased persons, and that notice of the hearing on the final account of the administrator shall be published for three weeks prior to the date of the final hearing.

Sec. 13 (R. 26-27) creates a presumption of death where any person disappears and his whereabouts remains unknown for the space of seven years and no knowledge of

such person can be procured for such period, and provides that, if no person or persons are found who would be his heir or heirs at law, then administration upon his estate shall be taken in accordance with the provisions of the law.

Sec. 15 (R. 27) provides that, upon the completion of the administration of an estate, escheated property shall be turned over to the State Board of Escheats as trustees, which shall cover the property or the avails thereof into the State treasury for the use of the primary school fund.

Sec. 21 (R. 29) directs that the Board of Escheats shall keep records of the property coming into its care and the time and amount of money covered into the State treasury on account of each estate, the account to be kept in the office of the State Treasurer as a public record.

Sec. 22 (R. 29-30) provides that, "*at any time*" after property is assigned to the State as an escheated estate or as abandoned property, any person may file with the Board of Escheats satisfactory proof, to be determined by the Board, of the right of such person, as husband, wife, heir at law, next of kin, devisee or legatee or assign, to the estate of the disappeared, missing or deceased person, in which case the Board, upon the payment to the Board of expenses which have been incurred in relation to the estate, shall cause the property to be turned over to such person. This section contains a similar provision giving the right to the assignee of any depositor other than a depositor who was a natural person, "*at any time*" upon satisfactory proof, to obtain the property. A like right is given to the depositor presumed to be deceased or to have abandoned his property and whose estate has been administered or whose property has been decreed to have been abandoned, "*at any time*" upon satisfactory proof of his identity and right to the property, to receive the property. The section further provides that payment shall be made out of any

money in the State treasury which has been derived from escheated estates or abandoned property, and the persons entitled to the deposit are expressly given the right to review by the Michigan Supreme Court, by certiorari, of any final decision of the State Board.

No time limit whatever is imposed upon the right of the person entitled to the property to claim the same.

Sec. 23 (R. 30-31) provides indemnity to the depository who has paid money or property to an administrator or the State Board of Escheats who is thereafter required to carry out and perform the contract of deposit with the depositor or the heirs, holders for value or assigns of the depositor or the person in whose name the property was held; the State being required to pay to the depository the amount of damage or loss it may have sustained, the amount to be paid out of any money in the State treasury which has been derived from escheated estates or abandoned property. The depository is given the right to review any final decision of the State Board of Escheats by the Michigan Supreme Court, by certiorari.

While there are other provisions of the statute relating to escheat of real property, the sale thereof and other details, the foregoing is a summary of the provisions believed pertinent to the issues in this suit.

B. The lower court held the Michigan law invalid as repugnant to the National Bank Law.

The sole question as to jurisdiction is whether appellant was "relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States" (Title 28, U. S. Code, Sec. 1254(2) as revised).

Cases sustaining the jurisdiction of the Supreme Court of the United States in appeals from a Circuit Court of Appeals where that Court has held a State statute to be invalid as repugnant to the Constitution, treaties or laws of the United States are *McCarroll, Commissioner of Revenues of Arkansas, v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176; *New State Ice Company v. Liebmann*, 285 U.S. 262; *People of the State of New York v. Latrobe*, 279 U.S. 421; *Republic Pictures Corp. v. Kappler*, 327 U.S. 757; *Keating v. Public National Bank*, 284 U.S. 587; *City of Richmond v. Deans*, 281 U.S. 704; *Ott v. Mississippi Barge Line*, 336 U.S. 169.

While the above cases were decided under Sec. 240 of the Judicial Code (Title 28, U.S. Code, Sec. 347) before its recent revision, the present section, as revised by the Act of June 25, 1948 [Title 28, U.S. Code, Sec. 1254(2)], is substantially identical on the ground for appeal. See reviser's notes to revised Sec. 1254.

The decision below (R. 68) was expressly based on the merits, the Court holding that application of the Michigan law consitutes an unlawful interference with the liquidation of a national bank, thus determining that the Michigan statute is invalid as repugnant to the National Bank Law and in particular to Sec. 194 (Title 12, U.S. Code, Sec. 194; R.S. 5236), which provides:

> "From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are

paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

This point was urged by defendant Connolly in the District Court and Circuit Court of Appeals as ground for the dismissal of the petition in the District Court and the affirmance of such dismissal, in that the petition failed to state a cause of action if the Michigan law was invalid as repugnant to the federal statute.

The Court below in its opinion (R. 66-67) referred to three earlier cases in the same Court, viz.:

Starr v. O'Connor, 118 F. 2d 548 (decided Mar. 14, 1941), certiorari denied 314 U.S. 695;

Rushton v. Schram, 143 F. 2d 554 (decided May 31, 1944);

Starr v. Schram, 143 F. 2d 561 (decided May 31, 1944).

These are earlier cases involving different issues.

The first of the cases above mentioned involved the law of Michigan prior to its amendment in 1941, which the present case concerns.

The second two cases above cited relate to the Michigan statute now involved.

However, all three cases related to attempts of the then Attorney General of Michigan to apply escheat law to dormant deposits in the First National Bank—Detroit in

liquidation, *where the depositor had failed to present a claim.*

The present case relates solely to *proven claims* where the claimant *after proving his claim* has disappeared for seven years or more. That this is an entirely different situation, we shall later point out.

That appellant was relying on a State statute, viz., the Michigan escheat law, is of course undenied. But appellee contends that the Court of Appeals merely held the statute inapplicable to a national bank in liquidation and not invalid as repugnant to the National Bank Law. Appellee is demonstrably in error.

Appellee repeatedly contended below that the Michigan statute was an unlawful intrusion upon the National Bank Law. To this the Court below agreed, although as we contend, erroneously.

In the earlier case of *Rushton v. Schram*, 143 F. 2d 554, two of the three judges did base their decision as to unproven claims on the ground that the Michigan statute was not retroactive to the seven-year period prior to the bank failure, but the third (Simons, C. J.) based his decision on the invalidity of the Michigan statute as repugnant to the National Bank Law, stating (p. 561):

> "I think, however, that the amended Act, at least insofar as it permits the state administrator to exercise powers of visitation and inquisition, and insofar as it imposes penalties upon an agency of the federal government in possession of the assets of an insolvent national bank, operates as an unlawful interference with the liquidation of a national bank provided for in Sec. 194, 12 U.S.C.A., of the National Banking Act.

> • • • I think the state is not empowered to interfere with it without the government's consent, clearly expressed in Congressional enactment."

The decision of the other two judges was contrary to *Evans Products Co. v. State Board*, 307 Mich. 506. Furthermore, it is not a retroactive application of the Michigan law in the present case of abandonment of proven claims to apply it to antecedent facts, i.e., part of the abandonment period after the claims were proved. *Cox v. Hart*, 260 U.S. 427, 435. In *Provident Institution for Savings v. Malone*, 221 U.S. 660, *Anderson National Bank v. Luckett*, 321 U.S. 233, and *United States v. Klein*, 303 U.S. 276, escheat laws passed or amended after all or a part of the dormancy period were held properly to embrace such prior periods.

The entire Court, apparently recognizing that the reason assigned by Judge Simons was the only ground upon which the decision could be plausibly based, accordingly in *Starr v. Schram*, 143 F. 2d 561, 562, held:

> "Upon conclusion of the hearing, the district court decreed that the escheat statutes of Michigan, including Act 170 of the Public Acts of Michigan for 1941, which was enacted subsequently to our decision in *Starr v. O'Connor*, supra, constitute an unlawful interference with the liquidation of an insolvent national bank, and are inapplicable to the receivedship in the instant case. The district court's decree to this extent was correct."

The Court below in the instant cause pointed out its prior unanimity on this ground (R. 67-68; 170 F. 2d 966, 967) and decided the instant cause expressly "on the merits", stating (R. 68; 170 F. 2d 967):

> "The present action brought by the State of Michigan to apply its laws of escheat in the circumstances

related constitutes an unlawful interference with the liquidation of a national bank upon the same principles and authority fully discussed in our previous opinions."

Appellee, in support of the alleged correctness of the decision below, cites *Davis v Elmira Savings Bank*, 161 U.S. 275, and *Easton v. State of Iowa*, 188 U.S. 220, both of which held State laws invalid as repugnant to the National Bank Law. Therefore, appellee himself must believe that the decision below was a holding that the Michigan escheat law was invalid as repugnant to the federal law.

If the Michigan law did not "apply" to a national bank in liquidation, the Court below could not have found that it constituted " an unlawful interference". It would merely have construed the law to be inapplicable. *An unlawful interference can occur only when a statute does apply but is invalid as repugnant to the federal law.* This is what the Court below held and it is from such a holding that right of appeal to this Court is expressly granted by the statute. The Court below did not point out, nor can there be discovered in the Michigan law, anything to make it "inapplicable" to a national bank in liquidation. Sec. 13a of the Michigan law (R. 27) provides for escheat to the State when a depositor has any moneys or credits in the possession or control of a depository where no dealings or transactions have been had with respect thereto between the depositor and the depository for seven years or more. Sec. 4b of the Michigan law (R. 17) defines "depository" to include "any person" and defines "person" to include, among other things, a bank and *any* governmental official, receiver, fiduciary or liquidating officer. The statute therefore applies to a national bank in liquidation, but was erroneously held below to be invalid in so doing as repugnant to the National Bank Law.

Appellee's references to cases dealing with appeals from State courts have no bearing on the present appeal. Appeal in such case is available where a State statute is held valid after its validity "is drawn in question" by the future *appellant* "on the ground of its being repugnant to the Constitution, treaties or laws of the United States" (Title 28, U.S. Code, Sec. 1257(2) as revised). The entire burden is thus upon the appellant; and it has long been the rule that he must clearly raise the issue of validity below and obtain a decision thereon.

An appeal from a Court of Appeals, however, is available to one who has brought an action relying on a State statute, which statute is held repugnant to the Constitution, treaties or laws of the United States (Sec. 1254(2) as revised). Appellant here sought a declaration that the Michigan escheat law applied to a national bank in liquidation and that the appellee was subject to and bound by the law (R. 14). This presented squarely the question of whether the statute was valid State legislation. Appellee claims that he at no time raised the issue of validity of the escheat law. As a matter of fact he claimed below that the State law was an invalid intrusion upon the National Bank Law. But if appellee had not so claimed, this would be irrelevant. If the right to appeal is to rest upon issues raised by the *appellee* and within his power to phrase as he pleases, the appellant's statutory right becomes a nullity. The holding of the Court of Appeals is the sole determining factor under Sec. 1254(2), whether that holding is of the court's own motion or in response to appellee's contention.

The cases cited by appellee with respect to appeals from State courts, even if applicable to the present situation, do not support the contention that appeal will not lie from a State court when a statute is sustained, although attacked because it infringes federal rights. *Charleston Federal*

Savings & Loan Association v. Alderson, 324 U.S. 182; *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649; and *Baltimore National Bank v. Tax Commission*, 296 U.S. 538, are cases where the appellant did not timely contend explicitly below that the statute was invalid, or where administration of the statute was attacked and not the validity of the statute itself. Of course, when the validity of the statute was properly "drawn in question" because of its interference with federal rights, this Court does grant appeals from State courts, as required by the statute. *Lawrence v. State Tax Commission*, 286 U.S. 276; *State Farm Mutual Ins. Co. v. Duel*, 324 U.S. 154; *Chassaniol v. Greenwood*, 291 U.S. 584; *Senn v. Tile Layers Protective Union*, 301 U.S. 468; *Richfield Oil Corp. v. State Board*, 329 U.S. 69. The right of appeal accrues when there was properly "drawn in question" a particular unconstitutional application of the State statute rather than the validity of the statute as a whole. *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282; *Furst v. Brewster*, 282 U.S. 493. See also *Fleming v. Rhodes*, 331 U.S. 100, 103, 108.

Appellee's contention is equally unfounded when he claims that appeals do not lie from a court of appeals where a State statute is held not to be validly applicable because the application would infringe federal rights. Appellee criticizes the cases cited by us on the ground that in such cases it was held that the State had no power to enact the legislation in question because of federal constitutional prohibition. But that is precisely what happened in the instant cause when the Court held the escheat law to be an unlawful interference with liquidation of a national bank under Sec. 194 of the National Bank Law, this being, according to Judge Simon's statement in the earlier case of *Rushton v. Schram*, 143 F. 2d 554, 561, a thing the State is "not empowered" to do. *"Applicability" is the sine qua non of "unlawful interference". If the State law*

was inapplicable, there would have been no interference, unlawful or otherwise.

While the Court below did not hold that Michigan could not enact an escheat law, it did hold that it had no power to enact such a law as applicable to a national bank in liquidation. Such holding was wholly decisive in this case on the question of invalidity of the State law as repugnant to the National Bank Law. A statute may be invalid as applied to one state of facts and yet valid as applied to another, so that in any particular case the question of invalidity *in toto* is not at issue. *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282; *Poindexter v. Greenhow*, 114 U.S. 270; *St. Louis, etc., Ry. Co. v. Wynne*, 224 U.S. 354.

Gamble v. Daniel, 281 U.S. 705 (from 39 F. 2d 447), cited by appellee, does not sustain his position. The holding below did not declare invalid a State insolvency law, but decided merely that upon bankruptcy the State liquidator was properly required to turn over assets to the bankruptcy trustee. The State law did not provide otherwise. In *Reeves v. Williamson*, 317 U.S. 593 (from 127 F. 2d 657), also cited by appellee, the holding below did not invalidate the Kentucky tax statute, but merely its attempted administrative application to postal savings not expressly covered by the statute. In the instant cause, the Michigan escheat law expressly covered all banks and receivers thereof, but was erroneously held invalid because of its alleged interference with national banks. When validity of the same Kentucky statute was drawn in question in a case where, by its terms, the law applied to out-state deposits, this Court did allow an appeal. *Madden v. Kentucky*, 309 U.S. 83.

In any event, cases of appeal from Courts of Appeal decided before the Act of June 25, 1948, are no longer

completely controlling. *Congress has enlarged the right of appeal from such courts.* Prior to the recent revision, Sec. 240(b) of the Judicial Code (28 U.S. Code, Sec. 347) confined the right of appeal to cases where the validity of the State statute "is drawn in question", the same words used with respect to appeals from State courts. But as revised in the present Sec. 1254(2), the requirement for appeal is merely that the State statute relied on be held to be invalid under federal law. It is no longer material whether such validity "was drawn in question" by the appellee. Thus *an appellee* can no longer seek to prevent an appeal by the way he phrases his pleading. The sole criterion is the holding of the Court of Appeals.

Nor is appellee correct in his reliance upon *P. J. Carlin Construction Co. v. Heaney*, 298 U.S. 637, *Bradford Electric Light Co. v. Clapper*, 284 U.S. 221, and *North Dakota v. Olson*, 280 U.S. 528, in support of the contention that the instant cause involves merely the question of which of two statutes applies. There was no real conflict between the statutes in the cited cases. But in the instant cause there was found to be a direct clash, in that the one was held "unlawfully to interfere" with the other. This case is precisely like *RFC v. Beaver County*, 328 U.S. 204, where this Court denied a motion to dismiss appeal in a case where the application of a Pennsylvania tax statute was claimed to conflict with the RFC statute. This case is directly controlling here.

C. The case is not moot. Appellee, in his statement opposing jurisdiction and also in opposing certiorari in the companion case (Docket No. 553, October Term, 1948; Docket No. 21, October Term, 1949), for the first time claimed as a defense that by Act No. 329 of the Public Acts of Michigan for 1947 (p. 591) (after the institution of this suit) the State, in enacting a new code of escheats,

repealed the statute here involved, although expressly providing (Sec. 65) "that no pending suit or proceeding shall abate or be in any way affected by such repeal".

To state this saving clause is sufficient to end the question of "mootness". Declaratory judgment suits are, of course, "suits or proceedings" and by the express terms of the federal statute have the force of final judgments subject to review, and in such a suit, after judgment and after reasonable notice and hearing, further relief may be granted under the statute without further suit (Title 28, U.S. Code, Sections 2201-2202).

This would be true even if the federal statute did not expressly so provide. As stated in Borchard, Declaratory Judgments (1934 ed.), page 172:

> "The declaration is an authoritative adjudication and guide to conduct, and rarely, so far as records disclose, has it become necessary again to invoke the aid of the court to carry a declaratory judgment into forceful effect. Whether or not the original declaratory order or decree reserves the liberty to apply for further relief, if necessary, such liberty is always implied and the American statutes make special provision for it."

Aside from the fact that in the pending suit, under the Michigan statute here involved and the federal statute, full relief can be given, it is clear that, even if it were necessary to institute a new suit under the new Michigan code (because the Receiver or the Comptroller refused to abide by the decision of this Court), this Court's determination would still be controlling of suit under the new code. *The decision below was not based on any particular wording of the Michigan law or on alleged inapplicability thereof.*

but was on the square ground (R. 68) that the Michigan law unlawfully interfered with the liquidation of a national bank under federal law. A decision here affirming the court below would make void not only the Michigan statute here involved but the new Michigan code and any otherwise valid escheat law of any State which purported to apply, among other things, to national banks in liquidation. A decision here reversing the court below, however, would validate not merely the law here involved but also the new Michigan escheat code and valid laws of all other States.

The new Michigan code does not vary from the law here involved in its applicability to all banks and receivers; and appellee has failed to point out in what way material to the questions here at issue it differs from the former law. It does not differ.

The chief meritorious question here is: Can the State of Michigan, by an otherwise valid escheat law, obtain escheat of proven claims against national banks in liquidation, or do the funds remain indefinitely in the United States Treasury because the State law is invalid as repugnant to the federal law?

The present controversy is actual, immediate and real and neither academic nor moot. Appellee never claimed otherwise until his briefs here in opposition to review, and the court below did not so find in its decision on the merits seventeen months after the passage of the new Michigan code.

Far from being moot, the present suit is the indispensable step crossing the threshold of enforcement of State escheat laws. Appellee refuses to make report of the amounts of proven deposits unclaimed and the names of the depositors (R. 12). It is the rest of the procedure to

collect which becomes moot, if the State law is held invalid, in that no further action can be taken without such records. If, on the other hand, the law is held to be valid, not only will the reports be obtained but the declaratory judgment law permits further action in this suit to collect the funds (Title 28, U.S. Code, Sections 2201-2202).

D. No settlement agreement disposed of this suit. Appellee sought to prevent review by asserting, in opposing appeal and certiorari, and by appending to his brief in present Docket No. 21, a settlement agreement of prior suits involving the entirely different question of claims which had been abandoned and not proved by the claimants. No settlement agreement was pleaded (R. 48-49), nor is the agreement in the record below or in any prior proceedings in this Court. An attempt in the court below to prejudice the court by a document referring to and quoting from the settlement agreement was stricken from the files (R. 65-66), "for the reason that it carries beyond the record in the case and contains argumentative matter not presented consistently with the rules of this court". It should likewise be stricken here.

If this Court cares to look at all at this improperly presented agreement, it will be seen at once that it only settled claims on dormant unproven deposits and not the right of the State to succeed to proven claims later abandoned, which is the matter now at issue for the first time.

Now that the Solicitor General of the United States has been substituted as counsel for appellee in lieu of his prior counsel, we doubt that further reference will be made to matters outside the record, not pleaded, and irrelevant in any event.

E. A substantial question is involved. The amount involved in the suit is large. The case was decided on the merits. The Supreme Court of the United States has not heretofore decided the exact question, although it has decided that similar State escheat laws are not repugnant to the National Bank Law when applied to an operating national bank. *Anderson National Bank v. Luckett*, 321 U.S. 233.

The Supreme Court of the United States has likewise held an escheat law applicable to funds which under federal statute have been covered into the Treasury. *United States v. Klein*, 303 U.S. 276. The present case is the only one which has applied contrary doctrine to proven deposits in a national bank in liquidation.

Solution of the problem of supposed clash between the National Bank Law and proper State escheat laws is a substantial one and important not only to the State of Michigan but to other States. Banks, whether State or national, are the largest source of escheatable funds. The United States has not passed any federal escheat law, the same being a subject reserved to the States. Large sums in the case of First National Bank—Detroit and many other national banks in liquidation now are and for many years have been in the Treasury of the United States awaiting payment on proven claims where the claimant has disappeared or died without known heirs, which sums, unless the National Bank Law conflicts, should be taken by the States where the banks were located for payment to the claimants, or the successors of the claimants, if they can be located by proper State judicial proceedings and publication of notice.

II.

If Appellate Jurisdiction Is Denied, Certiorari Should be Granted.

Appellant is also applying for certiorari with respect to the same judgment (Docket No. 553, October, 1948, Term; now Docket No. 21, October, 1949, Term). This is pursuant to the procedure approved in *Bradford Electric Light Co. v. Clapper*, 284 U. S. 221. Appellant believes this Court has jurisdiction of the appeal. The Court has held the certiorari petition in abeyance pending determination of appellate jurisdiction. If appellant is mistaken as to his right of appeal, it is requested that, because of the importance of the questions involved and for the reasons asserted in his certiorari petition, writ of certiorari be granted and the case decided. This is what was done under similar circumstances in *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368.

III.

The Michigan law is not invalid as repugnant to the National Bank Law in its application to proven claims against a national bank in liquidation.

The above statement presents the chief issue on the merits and the only one determined against the appellant in the Court of Appeals.

A. This case is not an attempted escheat of unproven claims. The court below recognized that this case differed from prior cases in that it related to proven claims thereafter abandoned by the depositors and not to dormant claims which the depositors had never proven. The court's

error was in holding that the difference was immaterial and that nevertheless there is here an unlawful State statutory interference with a national bank in liquidation, the court stating (R. 68):

> "The fact that we encounter here proven claims rather than dormant deposits supplies no logical basis for a declination to apply settled doctrine."

But the "settled doctrine" in the court below was with respect to the attempt of the State to succeed to claims which the depositor had failed to prove, an entirely different matter where there may well have been a clash with the federal law as to payment of liquidation dividends.

The first of the earlier cases, *Starr v. O'Connor* (1941), 118 F. 2d 548 (certiorari denied 314 U.S. 695), related to a different escheat law of Michigan than the one presently involved. The case was tried on a stipulation of facts covering $1,799,097.66 of bank deposits "upon which no claims had been presented to and accepted by the receiver" (p. 550). *The instant case, on the contrary, relates solely to claims which the depositor filed and had allowed but where he could not later be located to receive dividend checks or, if he did receive the same, has not cashed them for seven years or more* (R. 6, 11-12). The decision in *Starr v. O'Connor, supra,* was based (p. 566) on *First National Bank of San Jose v. California,* 262 U.S. 366, on the ground that the then escheat law of Michigan contained provisions conflicting with the National Bank Law and was "closer akin to illegitimate laws of forfeiture than to legitimate laws of escheat". This is the only case involving any Michigan escheat law which this Court has refused to review, the former escheat law of Michigan having contained provisions held unlawful in the *San Jose* case.

The next two cases in the Sixth Circuit, *Rushton v. Schram*, 143 F. 2d 554, and *Starr v. Schram*, 143 F. 2d 561, both decided May 31, 1944, did relate to the Michigan escheat law now involved, *but also solely to dormant deposits where no claim had been filed or allowed.* This difference the court below recognized in the instant case, as above pointed out.

When escheat is sought with respect to deposits where the depositor has never filed claim, it may well be argued that the State law does conflict with the National Bank Law (Title 12, U.S. Code, Sec. 194), which requires the Comptroller to "make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction", and which further requires that "the remainder of the proceeds, if any, shall be paid over to the shareholders" of the bank.

Thus a non-proven claim may be foreclosed and payments on proven claims thus augmented or, if a surplus results, the amount otherwise payable on an unproven claim may go to shareholders. This would be analogous to distribution in bankruptcy and equity receiverships. The National Bank Law, in the case of unproven claims, may thus decree a tontine right for the benefit of proven claims and shareholders and foreclose the State's right to succeed to unproven abandoned claims. This may be the correct basis for the decisions of the court below in the earlier cases relating to unproven claims and one of the reasons for denial of certiorari in the only earlier case in which certiorari was sought. It was the basis of denying escheat with respect to unproven claims in the case of *In re Commercial National Bank*, 45 F. Supp. 482 (E.D. Pa.), affirmed on opinion below 134 F. 2d 172 (C.C.A.3).

But, as we shall now point out, there is no such tontine right prescribed whereby funds payable on proven claims later abandoned go to augment payments to other claimants or to shareholders.

B. The State properly succeeds to proven claims later abandoned. Sec. 194 of the National Bank Law does not prescribe a tontine right whereby funds payable on proven claims, later abandoned, go to augment payments to other claimants or to shareholders. Cf. *Provident Institution for Savings v. Malone*, 221 U.S. 660, 665, and *Security Savings Bank v. California*, 263 U.S. 282, 286. While these cases relate to the application of escheat laws to operating State banks, they point out clearly that other depositors or shareholders should not profit from money owing to persons who have disappeared.

Thus in the *Malone* case the Court stated, page 665:

> "Neither the charter nor the by-laws create anything in the nature of a tontine, under which, on dissolution of the corporation, the then depositors would receive the money of those absent and unknown. On dissolution the shares of a depositor, who could not be found, would be paid over to his legal representative, who might be an administrator in case his death was established, or a guardian, in case of mental incapacity, or a trustee in bankruptcy in case of insolvency, or a representative appointed under statutes applicable to abandoned property."

Under the National Bank Law, not only is there no tontine right to profit from moneys owing on proven claims, but the Court rigidly enforces the rule of ratable payment on all proven claims. *Merrill v. National Bank of Jacksonville*, 173 U.S. 131, 143; *American Surety Co. v. Bethlehem National Bank*, 314 U.S. 314, 317. This goes to the extent

of denying preference to claims even of the United States itself, which is otherwise preferred under a general statute. *Cook County National Bank v. United States*, 107 U.S. 445.

The appellee, while not denying the rule of ratable payment or asserting a tontine right of succession to proven claims, seeks to accomplish a result which in practice would effect a non-ratable payment and a preference to the United States even though it has no claim at all, viz.: That money unpaid on proven claims should be held indefinitely in the United States Treasury until the claimant appears, if ever, the United States keeping the same if the claimant never appears. His appearance after seven years is unlikely, as the Comptroller refuses a report on the amount of the claim and no federal law provides for court proceedings and publication of notice to locate a disappeared claimant or his successors.

The National Bank Law (Sec. 194) requires payment on proven *claims*, not necessarily to the *claimant*. Thus a successor to an original claimant, by assignment, attachment, subrogation, or administration of his estate, is held entitled to stand in the original depositor's shoes. *Earle v. Conway*, 178 U.S. 456 (attachment of deposit in insolvent national bank); *American Surety Co. v. Bethlehem National Bank*, 314 U.S. 314 (subrogation to depositor in insolvent national bank); see also *Provident Institution for Savings v. Malone*, 221 U.S. 660, 665, and *Anderson National Bank v. Luckett*, 321 U.S. 233, 252.

The State has sole power over abandoned property just as it does over other transfers and devolution of property (*Anderson National Bank v. Luckett*, 321 U.S. 233, 240-241, 248) and hence proper escheat laws apply to banks, whether State or national. *Provident Institution for Savings v. Malone, supra; Anderson National Bank v. Luckett, supra; Security Savings Bank v. California, supra.*

While the *Anderson National Bank* case concerned application of State escheat law to an operating national bank, its reasoning is directly applicable to the present case. This Court there stated, pages 240-241:

> "Apart from questions which may arise under the national banking laws in the case of national banks, it is no longer open to doubt that a state, by a procedure satisfying constitutional requirements, may compel surrender to it of deposit balances, when there is substantial ground for belief that they have been abandoned or forgotten, *Security Bank v. California, supra;* certainly when the state acquires them subject to all lawful demands of the depositors. *Provident Savings Institution v. Malone*, 221 U.S. 660.
>
> "The deposits are debtor obligations of the bank, incurred and to be performed in the state where the bank is located, and hence are subject to the state's dominion. See *Security Bank v. California supra*, 285 and cases cited. *Irving Trust Co. v. Day*, 314 U.S. 556, 562. And it is within the constitutional power of the state to protect the interests of depositors from the risks which attend long neglected accounts, by taking them into custody when they have been inactive so long as to be presumptively abandoned, see *Provident Savings Institution v. Malone, supra*, 664, just as it may provide for the administration of the property of a missing person. *Cunnius v. Reading School District*, 198 U.S. 458; *Blinn v. Nelson*, 222 U.S. 1."

Page 248:

> "As we have seen, a bank account is a chose in action of the depositor against the bank, which the latter is obligated to pay in accordance with the terms of the deposit. It is a part of the mass of property

within the state whose transfer and devolution is subject to state control. *Security Bank v. California, supra,* 285, 286, and cases cited; *Irving Trust Co. v. Day, supra,* 562. It has never been suggested that nondiscriminatory laws of this type are so burdensome as to be inapplicable to the accounts of depositors in national banks.

"The statute here attacked does not purport to do more than does any other regulation of the devolution of bank accounts of missing persons, a function which is, as we have seen, within the competence of the state. Under the statute the state merely acquires the right to demand payment of the accounts in the place of the depositors. Upon payment of the deposits to the state, the bank's obligation is discharged. Something more than this is required to render the statute obnoxious to the federal banking laws. * * *"

and, page 252:

"* * * under the Kentucky statute, as in the case of an attachment or the administration of the estate of a deceased depositor, a change in the dominion over the accounts will ensue, to which the bank must respond by payment of them on lawful demand. But this, as we have said, is nothing more than performance of a duty by the bank imposed by the federal banking laws, and not a denial of its privileges as a federal instrumentality. In all this we can perceive no denial of constitutional right and no unlawful encroachment on the rights and privileges of national banks.

"Since Kentucky may enforce its statute requiring the surrender to it of presumptively abandoned accounts in national as well as state banks, it may, as an appropriate incident to this exercise of authority,

require the banks to file reports of inactive accounts, as the statute directs. *Waite v. Dowley, supra; Colorado Bank v. Bedford*, 310 U.S. 41, 53."

Unlike the right to prove a claim against the bank, the right to dividends *after proof of claim* is a fixed and vested right, since the federal statute sets forth no contingency by which the assets of the national bank to be devoted to payment of dividends on proven claims could inure to the benefit either of other creditors of the bank or of the stockholders or of the United States itself. Consequently there is no provision of the federal statute which expressly or by implication conflicts with the provisions of the Michigan statute as applied to the right to ratable dividends on proven claims. The Michigan Act merely provides for a change in dominion of the right to receive ratable dividends, and in this respect there is no unlawful interference with the liquidation of the bank. Instead, the State procedure actually expedites and facilitates the liquidation by handling unclaimed dividends which cannot otherwise be disposed of under the federal procedure. The escheat law no more interferes with the liquidation of the bank in its transfer of the depositor's proven claim to State control than the Michigan Probate Code so interferes in transferring a deceased depositor's proven claim to his executors, administrators or distributees.

If a State escheat law does not unlawfully interfere with the National Bank Law in the case of an operating national bank, then *a fortiori* is does not so interfere in the case of a bank in liquidation. In the latter case the bank has ceased to perform its federal functions anyway. While, to be sure, State law in such case cannot validly provide for a preferential distribution contrary to the ratable disribution provided by the federal statute (*Davis v. Elmira Savings Bank*, 161 U.S. 275), an escheat law is just the opposite, in that it

carries out ratable distribution whereby the State succeeds to the right to the proven claim, to hold for the depositor or his successors if found.

The National Bank Law does not purport to cover the matter of succession, by assignment, escheat, inheritance or otherwise, to proven claims against banks in liquidation.

As stated in *Prigg v. Pennsylvania*, 16 Peters 539, 617-618, a State does not have a right to interfere with a federal regulation on a particular subject "if Congress have a constitutional power to regulate a particular subject". Congress has no power to regulate escheats. *Anderson National Bank v. Luckett*, 321, U.S. 233, 240-241, 248; *American Loan & Trust Co. v. Grand Rivers Co.*, 159 Fed. 775 (W.D. Ky.). There is therefore no invalid interference.

No valid reason exists, or was even suggested by the court below, why the Michigan escheat law, in the case of a proven claim, should not apply to national banks, whether closed or open as this Court has held subrogation, attachment, and other assignment and devolution to apply, or in what respect the same would be repugnant to the National Bank Law. The Michigan law does not infringe the National Bank Law, but is impartial, applying to all banks and other depositories without discrimination as to national banks. *See Braun v. McPherson*, 277 Mich. 396.

Nor does the fact that insolvent national bank funds are paid to the Comptroller and by him covered into the Treasury (Sec. 192 of the National Bank Law) mean that the escheat law is repugnant to the federal law. In *United States v. Klein*, 303 U.S. 276, the Pennsylvania escheat law was held applicable to funds deposited in a federal court suit, although the same had been covered into the Treasury as required by federal statute.

It is futile for appellee to contend that, as claims against a bank are fixed as of the date of its failure, therefore a new claim cannot be made of escheat as of a later date. Ours is not a new claim. It is a derivative one in succession to a claim proved and allowed as of the date of the receivership, just like other claims of successors are.

C. This case is an example of the general rule of State law validity as to national banks. The cases permitting application of State escheat laws to national banks are merely examples of the general principle that such banks are subject to State laws which do not interfere with the purposes of their creation or tend to impair their efficiency as federal agencies. *National Bank v. Commonwealth*, 9 Wall. 353; *McClellan v. Chipman*, 164 U.S. 347; *First National Bank v. Missouri*, 263 U.S. 640.

The rules applicable to a determination of whether a State statute is repugnant to the National Bank Law are well summarized in *McClellan v. Chipman*, 164 U.S., 347, 356, where it is stated:

> "• • • Two propositions have been long since settled by the decisions of this court:
>
> "First. National banks 'are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and conconstrued by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.' *National Bank v. Commonwealth*, 9 Wall. 362.

"Second. 'National banks are instrumentalities of the Federal government created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a State to define their duties, or control the conduct of their affairs, is absolutely void, whenever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiencies of these agencies of the Federal government to discharge the duties for the performance of which they were created.' *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283.

"These two propositions, which are distinct, yet harmonious, practically contain a rule and an exception, the rule being the operation of general state laws upon the dealings and contracts of national banks, the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States."

It is apparent that this case comes within the general rule and not the exception.

To apply State escheat laws to proven claims later abandoned, whereby the State as successor to the claimant holds the money for the owner if found, interferes neither with the purposes nor the efficiency of national banks. It conflicts with no provision of the federal statute. It merely prevents the United States Treasury from keeping indefinitely money it admittedly owes proven claimants, which the United States has no power to escheat. *Amer-*

ican Loan & Trust Co. v. Grand Rivers Co., 159 Fed. 775 (W.D. Ky.).

The following quotation from *McClellan v. Chipman*, *supra*, page 359, is directly pertinent:

> "As long since settled in the cases already referred to, the purpose and object of Congress in enacting the national bank law was to leave such banks as to their contracts in general under the operation of the state law, and thereby invest them as Federal agencies with local strength, whilst, at the same time, preserving them from undue state interference wherever Congress within the limits of its constitutional authority has expressly so directed, or wherever such state interference frustrates the lawful purpose of Congress or impairs the efficiency of the banks to discharge the duties imposed upon them by the law of the United States."

D. The Michigan statutory procedure is not contrary to due process.

The appellee did not claim below that the Michigan statutory procedure violated due process or amounted to a forfeiture instead of a true escheat, such as existed in *First National Bank of San Jose v. California*, 262 U.S. 366. Even if such question had been raised as to the Michigan law here involved, the Michigan law is a proper one. While there are presumptions of death or abandonment after seven years, these are rebuttable and the depositor or his successors may *at any time* in the future recover the fund from the State (Sections 9b, 10, 13, 13a, 22; R. 23-30). Service by publication is required if the depositor or his heirs cannot be located for service (Sections 9b, 10a; R. 23, 24-25). Full indemnity is given to the depository which

makes payment to the State as to claims of the depositor, his heirs, holders for value and assigns (Sec. 23; R. 30-31). The provisions of the Michigan law more liberally protect the depositor and the bank than those approved in *Anderson National Bank v. Luckett*, 321 U.S. 233, and *Security Savings Bank v. California*, 263 U.S. 282. Report is required (Sections 6, 6a; R. 18-20), as permitted by the *Anderson* case (p. 252). This, of course, is essential in order to permit the State to proceed further.

E. The question is not res adjudicata. Although appellee did not plead *res adjudicata* (R. 48-49), he endeavored to assert the point here in his motion to dismiss or affirm and also in opposing certiorari in present Docket No. 21 (No. 553, October, 1948, Term). This was based on the earlier decisions in the Court of Appeals previously discussed. But these related to Michigan's claim to unproven dormant deposits and not to the subject matter of the present suit to succeed to proven claims, an entirely different subject. The difference is pointed out in the opinion below (R. 68), and in *Starr v. O'Connor*, 118 F. 2d 548, 550, the nature of the prior suit as relating to unproven claims is made clear.

If the Court desires to consider a defense not pleaded or passed upon below or to look at prayers in previous suits not in the record here but appended in respondent's brief in opposition to certiorari in Docket No. 21, we refer to page 5 of our reply brief in Docket 21 and the appendix thereto referring to fact averments in the prior cases, and also to our brief in opposition to motion to dismiss in the present case (Docket No. 24, pages 1-4). But it is inconceivable that this case will be decided here upon such extraneous matter neither pleaded nor proved.

IV.

No Other Question Prevents Reversal of the Court Below

If the Court decides against appellant and holds that the Michigan law is repugnant to the National Bank Law, that, of course, ends the case. If, however, the Court holds the Michigan law to be valid when applied to a national bank in liquidation, then the Court comes to some subsidiary federal questions.

Review on appeal [Title 28, U.S. Code, Sec. 1254(2), as revised], just as under the former Sec. 240 of the Judicial Code, is of course "restricted to the federal questions presented". The Court, having decided that the Michigan law is not repugnant to the federal law, should pass upon other federal questions presented, just as in *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, the Court, having reversed the Court of Appeals on the question upon which appellate jurisdiction was based, then decided other questions involved.

The other questions were assumed by the court below in our favor but not decided (R. 68). They should now be decided. They are not difficult.

A. The District Court had jurisdiction of the subject matter. Appellee claimed otherwise in his motion to dismiss in the District Court (R. 48).

Sec. 24 of the Judicial Code, effective at the time suit was instituted (Title 28, Sec. 41, U.S. Code, before its 1948 revision), provided:

> "The district courts shall have jurisdiction as follows:
>
> * * * * *
>
> *

"(16) Of all cases commenced by the United States or by direction of any officer thereof against any national banking association, and cases for winding up the affairs of any national bank; • • •."

This does not differ materially from the present statute (Title 28, U.S. Code, Sec. 1348, as revised).

A suit with respect to a claim against a national bank brought against its receiver is, of course, a case relating to winding up the bank's affairs and within the jurisdiction of the District Court where the bank is located. *International Trust Co. v. Weeks*, 203 U.S. 364. See also the cases cited in succeeding Subdivision B, in which claims against bank receivers were entertained in the District Courts where the banks were located and which this Court would have dismissed *sua sponte* had there been no jurisdiction.

In *Auten v. United States National Bank*, 174 U.S. 125, a suit in federal court against a national bank receiver was sustained, in the absence of diversity of citizenship, as a claim arising under the laws of the United States.

B. The Receiver, who is the only necessary and proper party, is before the Court and was properly sued. Appellee claims that an alleged necessary party, the Comptroller of the Currency, is not before the Court. This is an abrupt about face by appellee, the Comptroller in an earlier case having obtained his dismissal because he was an unnecessary party. The Court of Appeals stated in *Starr v. O'Connor*, 118 F. 2d 548, 550:

"The attorney general of Michigan filed the suit on behalf of the state against the receiver of the First National Bank—Detroit and the Comptroller of the

> Currency of the United States, the latter of whom was dismissed on motion as an unnecessary party."

This playing hide-and-seek with the Court avails appellee nothing. The claim is based on the contention (R. 48) that suit could not be brought against the receiver alone because, under Sections 192 and 194 of the National Bank Law, the receiver pays the money to the Comptroller and the latter pays the dividend. But a long line of decisions has sustained suits against receivers with respect to claims against national banks, even though the Comptroller is not a party and is the one who pays the dividend. *Case v. Bank*, 100 U.S. 446; *Armstrong v. American Exchange National Bank*, 133 U.S. 433; *Earle v. Conway*, 178 U.S. 456; *Merrill v. National Bank of Jacksonville*, 75 Fed. 148 (C.C.A. 5), affirmed without discussing the point, 173 U.S. 131; *American Surety Company v. Bethlehem National Bank*, 314 U.S. 314. As stated in *Taylor v. Spurway*, 72 F. 2d 97, 99 (C.C.A. 5):

> "If it should transpire that the receiver has no funds to respond to a judgment, it must be assumed that the Comptroller, although beyond the reach of process of the court rendering the judgment, will give effect to a valid judgment of a court of competent jurisdiction. *Earle v. Pennsylvania*, 178 U.S. 449."

See also *General American Life Ins. Co. v. Anderson*, 156 F. 2d 615 (C.C.A. 6); *Wever v. Dakin*, 81 F. 2d 831 (C.C.A. 5); *Brown v. Tillinghast*, 84 Fed. 71 (D.C. Washington); and *In re Commercial National Bank*, 45 F. Supp. 482 (E.D. Pa.), affirmed on opinion below 134 F. 2d 172 (C.C.A. 3), in which last mentioned case it was held the receiver was the necessary and indispensable party to the suit to enforce the Pennsylvania escheat law against a national bank in liquidation.

In light of the overwhelming authority that suits to compel the payment of claims against a national bank in liquidation are properly brought against the receiver and not the Comptroller and the lack of any authority to the contrary of which we have knowledge, nothing is gained by discussion of the principles applicable in other situations not involving national banks, as to when a superior officer need be or need not be joined as a party.

Under the above decisions, the bank receiver is accountable to claimants. He is also accountable to the Comptroller. By Sec. 6 of the Michigan law (R. 18), escheat reports are required from "depositories indebted or accountable to any other person." The Michigan statute covers the situation squarely. The court below did not imply the contrary.

Neither *In re Chetwood*, 165 U.S. 443, nor *United States v. Weitzel*, 246 U.S. 533, cited by appellee, holds that suit may not be brought against the receiver with respect to claims against the bank. They in fact imply or state the contrary. In the *Weitzel* case it appears that the bank itself may be sued, even after the receiver is appointed.

Nor does the fact that the appellee claimed the receivership was closed make any difference. He was alleged to have been appointed and to be acting as Receiver (R. 4-5), which averment was admitted by defendant's motion to dismiss. Although in an affidavit annexed to the motion appellee claimed that the receivership was "deemed technically closed" (R. 53), the same affidavit discloses (R. 53-54) that defendant Connolly was given a commission as Receiver "to act in such incidental cases that might require action by a receiver". This is one of such cases. Furthermore, after the institution of suit *the Receiver as such* entered into a stipulation permitting him to send records to the Comptroller without prejudice to the issues involved (R. 38).

Appellee, in his attempt to answer in his favor the riddle "When is a receiver not a receiver?", seeks to rely on a self-serving statement of the Comptroller in his 1944 report to Congress (Table 45 of the Comptroller's Eighty-second Annual Report) that the receivership was closed, and hence contends that the Receiver cannot be sued. In spite of this statement, we know appellee was still Receiver when the suit was commenced. He so described himself in his appearance (R. 37), the stipulation above mentioned (R. 38), and his motion to dismiss (R. 48). The McCandless affidavit, as above mentioned, admits his appointment after the receivership was "deemed technically closed" (R. 53-54).

By what authority under the law the Comptroller can "deem" a receivership "technically closed", while still maintaining a Receiver in existence for various purposes remains unrevealed. *Also, if the Receiver is available, as appellee says, to take care of incidental matters that, in the public interest, merit attention, the filing of reports under the Michigan Escheats Law is just such a matter which, in the public interest of all the people in Michigan, merits attention.*

Further, the mere fact that the liquidation of the bank had been completed gives rise to no assumption which has any relevance to this suit. The only point at which, according to the National Bank Act, the Receiver may be "discharged from any and all liabilities to such association and to each and all the creditors and shareholders thereof" is upon payment of the full amount of all claims to creditors and transfer of remaining assets to an agent for the shareholders under Sec. 197 of the Act. See *United States v. Weitzel*, 246 U.S. 533, 541. Therefore, until the steps required in Sec. 197 can be taken, the Receiver is not discharged of all his duties to creditors or anyone standing

in place of such creditors. The fact that appellee can admittedly do some acts as Receiver means that he is a Receiver for all receivership matters which arise; for there is no provision in the law which provides for a limited Receiver.

While the affidavit in support of appellee's motion to dismiss asserts (R. 53) that the records, proofs of claim, checks, etc., are "invariably forwarded" on the termination of a receivership to the Comptroller, there not only is no authority in law for such asserted practice, but so to do would be contrary to the National Bank Act, Title 12, Sec. 192, U.S. Code, which states, among other things:

> "Such receiver, under the direction of the Comptroller, shall take possession of the books, records and assets of every description of such association, * * *."

Certainly, while still in office, he had violated this direct statutory command if he surrendered his possession to the Comptroller or anyone else, and Connolly was right, if his motion was meant to refer to such records and checks, when he denied he was acting as the validly appointed or authorized agent or representative of the Comptroller (R. 48-49).

C. This is not a case against the United States. Appellee, although he did not so plead below, now claims that the present suit amounts to one against the United States, disregarding the cases cited by us and innumerable other ones sustaining suits on claims against bank receivers. The funds awaiting payment on proven claims do not belong to the United States. Congress has no power, even had it wished, to declare escheat thereof to the United States. *Anderson National Bank v. Luckett*, 321 U.S. 233, 240-241, 248; *American Loan & Trust Co. v. Grand Rivers Co.*, 159

Fed. 775 (W.D. Ky.). The fact that the funds may be paid into the United States Treasury does not prevent escheat under a State law. *United States v. Klein*, 303 U.S. 276. As we have pointed out, moneys payable on proven claims do not augment payments otherwise due on other claims. The same will lie in the Treasury indefinitely unless the State is held validly to succeed to proven claims under its right to control the devolution of property and unless the State can take action to discover the claimants or their successors. Thus, although the United States has no right to keep the funds and does not claim the right, appellee nevertheless seeks, in effect, to have the money escheat to the United States, by contending that this is a suit against the United States and not properly brought against the Receiver.

Appellee relies on *Aldrich v. Chemical National Bank*, 176 U.S. 618, (59 Fed. 372); *O'Connor v. Rhodes*, 79 F. 2d 146 (C.A., D.C.); *Burnell v. United States*, 44 Ct. Cl. 535; *Maricopa County v. Valley National Bank*, 318 U.S. 357; *Richmond F. & P. R. Co. v. McCarl*, 62 F. 2d 203 (C.A., D.C.), certiorari denied 288 U.S. 615; and *Haskins Bros. & Co. v. Morgenthau*, 85 F. 2d 677 (C.A., D.C.), certiorari denied 299 U.S. 585. None of them sustains appellee's point. They make it clear that the suit is not one in substance against the United States, when the United States makes no claim to the funds but is holding them admittedly for other persons. Appellee's argument proves too much. If well founded, no suit to establish a claim could be brought against any national bank receiver for any purpose.

The case of *In re Escheat of Moneys*, 358 Pa. 133, 57 A. 2d 256, relied upon by appellee, illustrates the type of case where escheat cannot be asserted. There, by federal statute, unclaimed seamen's wages paid into the Treasury were applicable to the relief of other destitute seamen, etc.

Of course, Pennsylvania could not escheat the same as successor to the seaman who had not claimed his wages, as in such event the federal law expressly appropriated the wages to another purpose. As we have pointed out, nothing of the sort appears in the National Bank Act as to proven claims. The money is in the federal Treasury awaiting claimants. The United States makes no claim thereto and has no right thereto. Suppose the administrator of a claimant appeared and sought the money but the Comptroller doubted the validity of the administrator's appointment and the administrator brought suit. Certainly this would not be a suit against the United States. Neither is it a suit against the United States when the State of Michigan claims succession by escheat to the right of a disappeared claimant. See also *United States v. Borcherling*, 185 U.S. 223, 232.

United States v. Klein, 303 U.S. 276, is the controlling authority as to the right to escheat funds admittedly due to private claimants, although the funds have been paid into the United States Treasury. See also the companion case, *United States v. Klein*, 106 F. 2d 213 (C.C.A. 3), certiorari denied 308 U.S. 618.

CONCLUSION

The judgment of the Court of Appeals should be reversed. The Michigan escheat law should be held valid and not repugnant to the National Bank Law in its application to proven claims against First National Bank—Detroit in liquidation. The appellee Receiver should be held bound in this suit to make report to the State Board of Escheats as to proven claims against the bank where dividend payments have not been made for seven years or more after the dividends became payable. The case should be remanded to the District Court for the purpose of taking such further action as may be necessary to effect escheat of such unpaid moneys to the State of Michigan.

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APPENDIX

APPENDIX

Title 12 U. S. Code (National Banks)

Sec. 191. General grounds for appointment of receiver.

Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section 93 of this title, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section 192 of this title.

Sec. 192. Default in payment of circulating notes.

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and

may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all moneys so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.

Provided, That the comptroller may, if he deems proper, deposit any of the money so made in any regular Government depositary, or in any State or national bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safe-keeping and prompt payment of the money so deposited: *Provided*, That no security in the form of deposit of United States bonds, or otherwise, shall be required in the case of such parts of the deposits as are insured under section 264 of this title. Such depository shall pay upon such money interest at such rate as the comptroller may prescribe, not less, however, than 2 per centum per annum upon the average monthly amount of such deposits.

Sec. 193. Notice to present claims.

The comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof.

Sec. 194. Dividends on adjusted claims; distribution of assets.

From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

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Supreme Court of the United States

October Term, 1949

No. 24

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STEPHEN J. ROTH, Attorney General of the State of Michigan, etc.,

Appellant,

vs.

PRESTON DELANO, Comptroller of the Currency of the United States of America, et al.,

Appellees.

Appeal from the United States Court of Appeals For the Sixth Circuit

Reply Brief for Appellant

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Supreme Court of the United States

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No. 24

STEPHEN J. ROTH, Attorney General of the State of Michigan, etc.,

Appellant,

vs.

PRESTON DELANO, Comptroller of the Currency of the United States of America, et al.,

Appellees.

Appeal from the United States Court of Appeals
For the Sixth Circuit

Reply Brief for Appellant

I.

Questions Eliminated

The able brief of appellee has dropped certain claims of his former counsel. It is no longer asserted that the United States District Court did not have jurisdiction over the subject matter, which was the first point in appellee's motion to dismiss the case in that Court (R. 48). Neither is it further claimed that this suit was disposed of by a

settlement agreement of a prior suit, not here pleaded, not in the record and not effecting settlement of the matters involved in the present suit in any event. Nor is it asserted that the Michigan Escheat Law lacks any features required by due process. Furthermore, it is admitted that the saving clause in the new Michigan Code of Escheats, which repealed the law under which this suit was brought, keeps this suit from being moot. Hence, the matters presented in our original brief (I.C., pp. 28-30; I.D., p. 31; III.D, p. 44; IV.A, p. 46) are, in effect, conceded. Likewise, appellee points out no errors in our statement of the case. He does mention some additional facts from an affidavit filed in the District Court in support of the motion to dismiss. So far as material we shall discuss these under the headings to which they apply.

II.

Jurisdiction

The appellee admits on the authority of *Charleston Ass'n v. Alderson*, 324 U.S. 182, 185-186, that what the appellee may have raised in his pleadings is immaterial if the lower court in fact passed upon the validity of the Michigan statute. Hence, we have no problem as to whether the validity was "drawn in question", a matter immaterial anyway under the present statute in appeals from courts of appeal (see our original brief, pp. 25-28).

Appellee, nevertheless, refers to his position in the lower court. He contends that this was "that the state statute does not apply because the National Bank Act provides a complete and exclusive system for the winding up of the affairs of an insolvent national bank". As a matter of fact, appellee phrased his position below as being that the Michigan law was an "invalid intrusion" on the Federal

statute, but this is immaterial. The way appellee now sets forth his contention in the Court below, as above quoted, shows that his contention was, that the Michigan statute was invalid. His contention as now phrased was not that the Michigan statute if properly construed would not "apply" to national banks in liquidation, but that it could not validly be applied because of its alleged interference with the Federal statute. This brings the case squarely within appellate jurisdiction of this Court, under *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282, and the other cases cited in our original brief, pp. 26-27, which cases appellee does not controvert.

In support of the contention that this case involved only "applicability" and not "invalidity" of the Michigan statute, appellee refers to what he designates the main prayer of appellant's petition, below, viz., that the Michigan law be determined to be applicable to the bank in liquidation. This was merely one of the prayers. Another was (R.14) "that the defendants . . . are subject to and bound by the provisions of the foregoing laws (Michigan Escheat Laws)".

Appellee's only attempt to avoid the holding of the court below (R.68) that the Michigan Escheats Law constitutes "an unlawful interference with the liquidation of a national bank" is to the effect that this did not hold the Michigan law unconstitutional and therefore it was not held "to be invalid as repugnant to the Constitution". (28 U.S.C. 1254(2)). But Sec. 1254(2) is, of course, not so restricted. Appellate jurisdiction lies thereunder if a state statute is held invalid as repugnant merely to the *laws* of the United States. There was no question in the case concerning the Constitution as such. Of course, under the Constitution the United States had the right to create national banks as Federal instrumentalities and the National Bank Law

under the Constitution is supreme in the field it covers. The court below held the Michigan statute unlawfully interfered with the National Bank Act. The problem is one of alleged clash between state and federal laws, and this is sufficient for the appellate jurisdiction of this Court under Sec. 1254(2).

As to decisional law, appellee relies on *Gamble v. Daniel*, 281 U.S. 705, and *Reeves v. Williamson*, 317 U.S. 593, referred to in our original brief, p. 27. These were cases where this Court dismissed the appeal without full opinion. They were not cases of clear clash between state and federal laws as where appeals similar to the present one were allowed in *Madden v. Kentucky*, 309 U.S. 83 and *R.F.C. v. Beaver County*, 328 U.S. 204, the latter containing a full discussion squarely in point.

Phillips v. United States, 312 U.S. 246, relied on by appellee, involved not the invalidity of a state statute but the action of the state governor in calling out the militia, and of course was not within the appellate jurisdiction of this Court.

Nor does appellee gain any thing by contending that there was here involved merely the method of applying the Michigan statute rather than the statute itself. Of course, if the matter is merely one of administration under a statute rather than the statute, as in *Charleston Ass'n v. Alderson*, 324 U.S. 182, then the "statute" has not been held invalid. In the *Alderson* case, a state tax assessment statute was valid but was claimed to have been administratively applied in a discriminatory manner against the appellant. This is not what happened in the present case. The only administrative action of the State of Michigan was the action of the Attorney General in seeking a judg-

ment that the Michigan Escheats Statute was binding upon the bank in liquidation and on the receiver. Thus the validity of the law itself was placed squarely in issue and this was the only point at issue on this branch of the case.

But appellee seeks to show from a reference in the decision below to the former decision in *Rushton v. Schram*, 143 F. 2d 554, (R.67) that the Court in the present case was relying on the supposed non-retroactivity of the Michigan law. The majority of the Court did so rely in this former decision as to "*dormant*" deposits, that is to say, where no one had proved a claim thereto. But no one has contended and appellee does not now contend, in light of *Cox v. Hart*, 260 U.S. 427, and the more recent cases cited by us on p. 23 of our original brief, that there would be a retroactive application of the Michigan law as to proven claims by including in the abandonment period time which had elapsed prior to the enactment of the law.

Counsel think it unlikely, as we suggested in our original brief, p. 23, that the majority of the Court in *Rushton v. Schram, supra,* came around to the view of Judge Simons in the unanimous decision in *Starr v. Schram,* 143 F. 2d 561, and this because it was decided the same day. But we are not merely making a suggestion. The Court in the instant case (R.67) itself states that this was the case, "In Starr, Attorney General, v. Schram, Sixth Cir., 143 F. 2d 561 (decided the same day, May 31, 1944) this Court in unanimity affirmed the decree of the District Court to the effect that the escheats statutes of Michigan, including Act 170 of the Public Acts of Michigan for 1941, constitute an unlawful interference with the liquidation of an insolvent national bank . . ." The court's reliance in the instant cause on its former decision was therefore on this unanimous ruling in a former case and it thus (erroneously, as we submit)

held that in this case applying to proven claims the Michigan statute constituted an "unlawful interference with the liquidation of a national bank".

A careful reading of the decision of the Court below will indicate that that Court did not base its holding upon two grounds, as contended by appellee, viz., non-applicability and invalidity. The sole ground was invalidity, in that the Michigan statute was held to interfere with the federal law.

We are faced here with a practical problem, with actuality and not mere verbalism. The Court of Appeals, to be sure, did not use the words of Sec. 1254(2) to the effect that the Michigan statute is invalid as repugnant to the National Bank Law. But it is the same thing to say that the Michigan law is an unlawful interference with the federal law and therefore to refuse to hold that the appellee was bound thereby. We submit that appellee has failed to show how something which does not "apply" can unlawfully interfere with another statute. "Unlawful interference" is a holding of "invalidity" because of "repugnancy". Any other view would permit a Court of Appeals to deprive this Court of appellate jurisdiction when, in fact, holding a state statute invalid because of repugnancy to a federal law, by phrasing the opinion in such way as not to use the exact words of Sec. 1254(2).

III.

The Certiorari Petition

Appellee, in the first part of Division I.A. of his argument, contends that if appeal is denied the alternate petition for certiorari in Docket No. 21 should also be denied. Appellee at this point belittles the importance of this suit and neglects to note its apparent conflict with prior decisions of this Court, in *Anderson National Bank v. Luckett*, 321 U.S. 233, and *U.S. v. Klein*, 303 U.S. 276. This is inconsistent with appellee's contentions in Division I.E. of his argument where he is endeavoring to escape a decision on the important point involved and refers to many other cases where state escheat, if valid, might apply to other funds owed by the United States, and where appellee refers also to the statement in *Connecticut Insurance Co. v. Moore*, 333 U.S. 541, 563, as to the increasing use of escheat laws as sources of state revenue.

Specifically, appellee relies on only two things to indicate that a decision on the merits in the present case would have no general importance. The first is that even though appellant is successful in this case it might have to bring a new suit, not under the present law, but under the new Michigan Code which is alleged to differ from the Michigan law involved at present. Appellee admits that the new code did not terminate the present suit because of the saving clause and does not gainsay the clear principle of law (our original brief, pp. 28-30) that full relief could be given herein. He does mention the fact that a new suit (except for repeal of the law) might be brought under Sec. 9(b) of the law here involved (R.23). However, such a separate suit, as the words of the section show, is merely an alter-

native method which the Attorney General of Michigan "*may*" adopt.

Next, on the assumption that the appellant would not seek full relief in the present proceedings as expressly permitted by the Federal Declaratory Judgment Law, but would institute a new suit under the new Michigan Code of Escheats, appellee endeavors to raise doubts as to whether the new code (Mich. Stat. Ann., Sec. 26.1053) would cover a receiver or other liquidating officer of a national bank. This argument, removed at its outset one step from actuality, is wholly unfounded. Counsel admit that Sec. 5 of the new Michigan Code, in requiring escheat from holders of abandoned property, expressly defines "holder" to include "a bank, either state or federal", "a receiver or other liquidating officer", and "a governmental department, institution, or agency". Appellee's reference to certain special provisions relating to other persons not needed in the case of a bank or its receiver, of course, indicates no retraction of the broad definition. There are no special provisions as to numerous other "holders" embraced in the definition.

No doubt the escheat laws of other states differ in detail from that of Michigan. Each future case will have to depend on its own facts and law. However, this does not mean that the basic question in this case is of small importance. If an escheat law, however worded, may not validly apply to a national bank in liquidation, the states can by no wording of their statutes succeed to proven but abandoned claims against national banks after they are in receivership, although this Court has found no interference of such laws with the National Bank Law in the case of an operating national bank. *Anderson National Bank v. Luckett*, 321 U.S. 233. If this Court holds there is no such unlawful interference, then the states may proceed

with the drafting of valid laws, if by chance some of such laws are not now properly worded.

The second reason asserted against granting certiorari is that since the adoption of the statute for Federal deposit insurance the Federal Deposit Insurance Corporation is the receiver of national banks going into receivership after that law became effective in this regard. 12 U.S.C. 264. It is suggested that this would change the question in the future because of this changed personality of the receiver and because of the right of subrogation given the Corporation to claims of depositors and the specific treatment prescribed with respect to the rights of depositors who fail to claim insured deposits. But this will not render the present issue academic in the future. Subrogation to claims of a depositor in a national bank has previously been upheld. *American Surety Co. v. Bethlehem National Bank*, 314 U.S. 314. Sec. 264 (l) (4) expressly gives the duty to the Corporation "to wind up the affairs of such closed bank in conformity with the provisions of law relating to the liquidation of closed banks, except as herein otherwise provided". The other provisions are merely that the Corporation will retain for its own account moneys released because of its right of subrogation upon having paid insured deposits and that it shall pay the depositors and creditors the amounts available for distribution to them. Thus the Corporation rather than the Comptroller of the Currency now pays dividends. As to specific treatment of depositors who fail to claim insured deposits, Sec. 264(m) (5) provides for a notice to depositors and cuts off depositor's claims within eighteen months "against the Corporation with respect to the insured deposits and against the new bank and such other insured bank with respect to the transferred deposit". However, the statute expressly provides that in spite of the elapse of such period so far as the insurance is concerned "all rights of the depositor against the closed

bank and its shareholders or the receivership estate to which the Corporation may have become subrogated shall thereupon revert to the depositor". Hence the law so far as depositors' claims are concerned against the bank assets and the receivership in no way differs from the law at the present time.

We believe that this Court has jurisdiction over the appeal. However, if we are incorrect, this certainly is a case for decision on certiorari.

IV.

The Michigan Statute Lawfully Applies to National Banks in Liquidation

Much of appellee's brief is devoted to an attempt to avoid, if possible, a decision on the merits, but the meritorious question is discussed in division II at the conclusion of appellee's brief.

Appellee contends that the question involved is not whether the State's ownership of a claim against a bank in liquidation will be respected by Federal officials charged with the liquidation. We respectfully disagree, as it seems to us this is the sole question as the appellee refuses even to give a list of the names and amounts of proven deposits which have been abandoned. Appellee's contention is that the sole question is whether the State or the Comptroller of the Currency will do the distributing of unclaimed funds. This is merely a subsidiary matter. That the appellee knows that the question is whether the State's ownership of the abandoned claim will be respected is indicated by his reference to *Connecticut Insurance Co. v. Moore*, 333 U.S. 563, where it was pointed out that it would be naive to assume that the concern of the states over abandoned

funds reflects only solicitude for the unknown claimants. Of course Michigan desires the unclaimed funds for its primary school fund, although under its statute it must in judicial proceedings advertise for the claimants or their successors and is required to make payment to them at any future time however remote. There is no provision in Federal law for any such advertisement, by judicial proceedings or otherwise.

The weakness of appellee's contention on the merits is indicated by his concession that when a state by operation of its laws of descent succeeds to a depositor's claim against an insolvent national bank, the comptroller must and does honor the claim, and in this connection appellee admits it follows *United States v. Klein*, 303 U.S. 276. Appellee even admits, as compelled to by *Anderson National Bank v. Luckett*, 321 U.S. 233, that the escheat or appropriation by the state of property in fact abandoned or without an owner is as old as the common law itself, and hence the Comptroller would turn the money over to the State if this were an escheat, as in that case. But it is contended that the Michigan escheat law is different from that of Kentucky applied in the *Anderson National Bank* case. Appellee inadequately quotes this Court in the *Anderson National Bank* case by indicating that the Michigan statute would be bad in authorizing the State's taking the accounts into custody solely because of their dormancy. This Court in the *Anderson National Bank* case (page 251) was distinguishing *First National Bank v. California*, 262 U.S. 366, where an escheat law was held invalid because it did not provide for any determination of abandonment in fact; but inasmuch as the Kentucky law considered in the *Anderson National Bank* case provided for later determination of abandonment in fact, this Court held the law valid although "dormancy without more is made the statutory ground for the state's taking inactive bank accounts

into its custody." In fact, the Kentucky law upheld in the *Anderson National Bank* case is precisely like the Michigan law in this regard, this Court holding (p. 241):

> "And it is within the constitutional power of the State to protect the interest of depositors from the risks which attend long neglected accounts, by taking them into custody when they have been inactive so long as to be presumptively abandoned."

Hence the appellee fails in distinguishing escheat in the present case from that in the *Anderson National Bank* case, although the appellee would be willing to honor the escheat upheld in that case. Appellee's concession practically ends this case so far as the merits are concerned.

In appellee's admitted submission to the decision in *United States v. Klein*, 303 U.S. 276, he must realize that he is in the same position that the United States was in in that case. As there pointed out, the Government did not claim any right, title or interest to the sum on deposit, but merely claimed that the Pennsylvania escheat law interfered with the right of the United States to distribute the money itself. However, the Court there held that the application of the Pennsylvania law in determining title to the fund was not such an interference. Neither does the Michigan statute bring about such interference with any right of the appellee.

Counsel relies on language in *In re Rapaport's Estate*, 317 Mich 291, *certiorari denied sub nom., California v. Michigan State Board*, 332 U.S. 764. But the Michigan Court (p. 301) did not state without qualification that "escheat is distinct from succession". What it stated was:

> "The term 'escheat' is distinct from succession, *to heirs and next of kin.*" (Italics supplied.)

It also defined the term escheat as it had in the earlier case of *Braun v. McPherson*, 277 Mich. 396, as signifying "a falling of a decedent's estate into the general property of the state on his death intestate and without lawful heirs." To be sure, the Court also quoted (p. 302) from Beale, *Conflict of Laws*, to the effect that the escheat of chattels is not a matter of succession on death, but is rather a right to confiscate property to which there are no other claimants.

But whatever definition is used, the State becomes the successor to the title and is the owner of abandoned property, subject to the rights of the original owners, or their successors, if they can be found. The State of Michigan becomes the owner of the unclaimed proven deposit just as Kentucky did in the *Anderson National Bank* case, and has the right to custody pending appearance of the owner.

This brings us to the real question, viz., whether this right of ownership of Michigan interferes with the National Bank Act system for the operation and liquidation of national banks. If it does, the Court below should be affirmed.

We acknowledge, as we did in our original brief (pp. 42-44), the doctrine of *Davis v. Elmira Savings Bank*, 161 U.S. 275, and other cases now cited by appellee, that state laws are void when they are in express conflict with the National Bank Act and either frustrate the purpose of the national legislation or impair the efficiency of the banks as agencies of the Federal Government. We recognize that the Federal law does provide a system not only for the winding up of the national banks but for their operation, and as so provided, the banks cannot be interfered with. Of course the State of Michigan could not appoint a receiver of a national bank. Of course it cannot control

the disposition of the bank's assets or when dividends will be declared. But this is not being attempted by the Michigan escheat law. The Receiver has disposed of the assets. The Comptroller has declared dividends. Under Sec. 194 of the National Bank Act, the dividends must be paid "on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction." The claims of the holders of the deposits now in question have been proved to the satisfaction of the Comptroller or adjudicated in a court of competent jurisdiction. Payment is required on such claims, but not necessarily to the claimant. See our original brief (pp. 37, et seq.). National banks are subject to state laws as a general rule, unless within the exception above mentioned. Appellee does not contest this well established principle, perhaps best expressed in *McClellan v. Chipman*, 164 U.S. 347, See our original brief (pp. 42-43). In fact, appellee admits that national banks are subject to state laws relating, among other things, to the rights of succession to property. This he is compelled to do in light of *Anderson National Bank v. Luckett*, 321 U.S. 233.

The Congress of the United States chose not to provide a method for determining succession to claims. At this point in its provisions for operation and liquidation of national banks it left the matter to state law. Neither the Receiver nor the Comptroller is given any statutory authority to proceed by advertisement, in judicial proceedings or otherwise, to locate abandoned claimants. He does not do so. He admits that he now maintains "perpetual receivers" of defunct banks. The Comptroller's practice as to what to do in the absence of Federal legislation, which is now to maintain perpetual receivers and insist on not turning over the funds to the state as successor to the original claimant, is a relatively new one. Prior to 1937, when the Comptroller determined on his present stand, he

had voluntarily paid dividends to the State of Michigan even on unproven deposits in the very same bank here involved. After his change of practice in 1938 he sought return of the money, but was defeated in this attempt in *Starr v. Schram*, 143 F.2d 561.

This attempted change of ruling has been since litigated and has led to anomalous positions taken in the present case in light of the decisions of this court in *United States v. Klein*, 303 U.S. 276, and *Anderson National Bank v. Luckett*, 321 U.S. 233, handed down since the Comptroller's attempt to establish the new practice.

Thus appellee proudly points out that the Comptroller must and does honor a claim when a state succeeds to a depositor's claim by operation of its law of descent, and in an appendix to his brief copies correspondence with the Michigan Public Administrator of an estate in 1946. There the Public Administrator, even in the face of the refusal of the appellee to render a report of unclaimed deposits, apparently discovered that the particular decedent did have dividends coming to him from the liquidated First National Bank-Detroit, and the Supervising Receiver paid the money to the Administrator without inquiry as to whether the Administrator had caused publication to be made to find heirs of the decedent, or whether the money was going to the State of Michigan. He merely required death certificates. Suppose the decedent in that case had died at sea and no death certificate was obtainable but there was other proof of death which the Supervising Receiver of the bank chose not to consider sufficient? If, as appellee contends, the Receiver or the Comptroller has the sole right to decide who owns the claims, then his contention must go to the extreme that the Public Administrator could not sue to have the right to succession determined. But this would be taking the matter away from the determination of a

court of competent jurisdiction as provided in Section 194 of the Bank Act.

What it comes down to is that the appellee refuses to give to the State of Michigan the names of depositors who have abandoned their proven claims for seven years or more, or the amounts of the deposits. But if by chance Michigan learns of a particular abandoned deposit, then the Comptroller will pay over the dividend if he feels like it.

But state escheat laws like the Michigan law provide an orderly and consistent method. As approved in *Anderson National Bank v. Luckett*, 321 U.S. 233, they require the turning over of an abandoned deposit to the State, as successor to the owner, until by proper court proceedings, or otherwise, the owner or his successor is located.

The anomalous position of the appellee in struggling to avoid the consequences of the decisions of this Court handed down since the Comptroller tried to establish his new policy, is nowhere better shown than where it is stated in his brief that when all efforts on the part of the Comptroller have failed, it is then time enough to determine whether the remaining funds should go to Michigan or to the use of the Federal Government. Appellee does not deny that the Federal Government has no power to escheat the deposits. But the time the appellee hopes for, and until the expiration of which the money may be kept by the Comptroller, will never come. The Comptroller is not required by law to make an effort to locate disappeared claimants or their successors. If he conscientiously desired to locate them he would willingly give a report of the abandoned claims to the State of Michigan, which has a valid procedure to locate them. If by chance the State of Michigan does locate a depositor or his successor, or manages to get a pub-

lic administrator appointed of a deceased depositor who has died without heirs, then the Comptroller is willing to pay. He might also be willing to pay at some time indefinitely remote when somehow it is determined that "all efforts at distribution have failed". They never will have conclusively failed if the Comptroller will not make public the names of claimants and the amounts of claims, and permit Michigan to take custody of the amounts for the claimants, if they can be located, or otherwise for State ownership.

Sixteen years have passed since the first payment of a dividend in First National Bank-Detroit in 1933, and appellee does not deny that he still has more than $300,000.00 (as admitted in the Court of Appeals) available on proven claims since abandoned by claimants.

It is apparent that the Federal law did not attempt to pass upon succession to abandoned claims but left it to state law. It is further apparent that there is nothing in the National Bank Law which the State law interferes with, and that the bank, being defunct anyway, is not interfered with as an instrumentality of the Federal Government. Neither is the Receiver or Comptroller interfered with by being required to perform his ministerial duty of making payment on claims to the lawful successor to the claimant as determined by State law.

Appellee cites no decision of this Court to support his contention, nor does he give any reason why payment to the State as successor to the claimant interferes with the National Bank Law. The court below in the present case gave no reason for its decision other than prior decisions. The only prior decision on the subject was the minority opinion of Judge Simons in *Rushton v. Schram*, 143 F.2d 554, 561, which, as previously pointed out, the court below later unanimously adopted. Judge Simons' decision was

right in the case of unproven accounts, as there the Federal law did cover the subject, and by tontine right (as in bankruptcy and equity) gave the amount which would have been payable on the claims, if proven, to augment proven claims. However, we submit that Judge Simons' decision when now applied to proven claims is erroneous in that the Comptroller must make payment on such claims, pursuant to Sec. 194; and State law, in determining the successor to the claimant, interferes with no provision of the Federal law. Judge Simons did not sit in the present case. (R. 66) With all deference we believe the court below in the present case was in error in following Judge Simons' decision in a case to which it was not applicable.

But appellee claims that even if Michigan is entitled to the abandoned claims it is, nevertheless, defeated because the requirement of a report from a Federal officer, which lies at the threshold of obtaining payment of the claims, is itself blocked by constitutional barriers. In this appellee relies on a 1913 opinion of the then Michigan Attorney General with respect to a different Michigan escheat law and long prior to the decision in *Anderson National Bank v. Luckett*, 321 U.S. 233. The Comptroller did not follow this old Michigan Attorney General's opinion until 1937 in the present case. Messrs. Starr, Rushton, Black and Roth, successive recent Attorney Generals of Michigan, by their action in cases involving First National Bank—Detroit, have long since overruled the old Michigan opinion, and rightly so.

The statute referred to by appellee (12 U.S.C. 484) against the exercise of visitorial powers, applies to the national banks themselves, and only inferentially to their receivers. Nevertheless, in *Anderson National Bank v. Luckett*, 321 U.S. 233, 252, it is stated:

> "Since Kentucky may enforce its statute requiring the surrender to it of presumptively abandoned accounts in national as well as state banks, it may, as an appropriate incident to this exercise of authority, require the banks to file reports of inactive accounts, as the statute directs."

This Court there relied on *Waite v. Dowley*, 94 U.S. 527, where national banks were required to give lists of stockholders under state law; also upon *Colorado National Bank v. Bedford*, 310 U.S. 41. In *National Bank v. Commonwealth*, 9 Wall. 353, the bank was even made to pay, under state law, the tax levied on bank shares, although the bank itself was not taxable.

The requirement of reports to enable a state to enforce a valid state law is not the exercise of visitorial powers contrary to Federal immunity. The case of *Bank of America, National Trust & Savings Ass'n v. Douglas*, 105 F.2d 100 (C.A.D.C.) cited by appellee at the end of his brief, is one decided in the Court of Appeals for the District of Columbia, with the present Chief Justice participating. In that case it was held that the Securities and Exchange Commission was entitled to bank examiner's reports, the court pointing out (pp. 105-106) that this was not the exercise of visitorial powers contrary to law. This goes far beyond the present case. We are not seeking an accounting of the bank's affairs. We merely desire to know the names and amounts in connection with the deposits abandoned more than seven years, and the payment of such amounts to Michigan as required by its laws. That this is not a visitorial power in violation of the principle of Federal immunity is shown by *Guthrie v. Harkness*, 199 U.S. 148, 158, relied upon by the District of Columbia Court,

and in which stockholders under state law were permitted to make an actual examination of the records of a national bank.

Courts have not taken kindly to attempts by receivers to evade what would have been an obligation of representatives of the bank had it not been for insolvency and the appointment of a receiver. In *Hazen v. Hardee* (C.A.D.C.) 78 F.2d 230, 232, the Receiver of a national bank endeavored to avoid making tax reports for taxation in the District of Columbia. In that case the law applicable to the District required reports from banks, but not expressly from receivers, as in the instant cause. The court stated:

> "The receiver is the 'statutory assignee' of the association and represents both the creditors and the association. Kennedy v. Gibson, 8 Wall. 498, 506 19 L.Ed. 476. As such statutory assignee a duty is imposed on him to administer the estate for the benefit of those who may ultimately establish a right to share in its distribution, and this includes the duty to discharge all obligations of the association imposed by law. To permit the receiver to say that the duty of furnishing the particular return here in question is not imposed because the statute requires it to be filed by named officers of the bank, while at the same time conceding that such named officers, by operation of law, have neither the information, the right, nor opportunity to perform the duty, would be to adopt a strained construction of the act which, in our judgment, is wholly unjustifiable.
>
> "The question, as we view it, is not to be decided by such nice distinctions. It is, after all, a practical question, and, in the circumstances we have related, the refusal of the receiver to furnish the information

> or make the return, whether at his own instance or at the instance of the Comptroller, was arbitrary, tends to embarrass proper administration of the tax statutes of the District, and ought to be condemned. • • •."

Appellee's only reliance to the contrary is upon Judge Simons' opinion in the earlier case of *Rushton v. Schram*, 143 F.2d, 554, 561, where this able Judge did hold that the requiring of reports was an invalid exercise of the power of visitation and inquisition. Even Homer sometimes nods. It is for this reason that Congress has given appellate jurisdiction to the Supreme Court over decisions of our able Courts of Appeal.

We are not here concerned with the imposition of statutory penalties. The Kentucky statute upheld in *Anderson National Bank v. Luckett*, 321 U.S. 233 (Ky. Revised Statutes, 1932, Ch. 393, Secs. 393, 280) likewise imposed penalties, but was not for that reason held invalid. It is to be assumed that the Receiver and Comptroller will obey the decision of this Court if the same is adverse to appellee's contentions. If so, no question of penalties will arise. If it becomes necessary later to assert penalties, that is a case for another day.

The long list of cases of Federal immunity in other situations in the last division of appellee's brief has no bearing here in light of express decisions requiring reports from national banks and their receivers above mentioned.

V.

No Reason for Avoiding Decision on Merits

The appellee must realize the weakness of his case on the merits as he devotes most of his brief to an attempt to avoid such a decision. He has run the gamut of every possible objection which can be imagined. They are not well-founded.

A. *Comptroller Not a Necessary Party.* Appellee has cited no decision in a suit against the receiver of a national bank either to establish an original claim or succession thereto in which it has been held that the Comptroller of the Currency is a necessary party. It has been uniformly held otherwise in a long line of decisions in this Court and other courts (see our original brief, p. 48). Instead, appellee relies primarily on *Williams v. Fanning*, 332 U.S. 490, which did not involve a receiver and the Comptroller, but was a suit to enjoin a postmaster from carrying out an order of the Postmaster General and in which it was held that the Postmaster General was not a necessary party. *Williams v. Fanning*, and other cases relating to non-bank situations have nothing to do with the present case. The Comptroller is required to pay dividends on claims adjudicated by a court of competent jurisdiction. As pointed out in *Earle v. Conway*, 178 U.S. 456, in which there was a claim of succession to a depositor by reason of a writ of garnishment after the receivership and in which the Comptroller was not a party, it is the duty of the Comptroller to comply with the determination of a claim against the receiver. This is merely a ministerial duty of the Comptroller, the receiver having always been considered in all decided cases as the one to be made the party defendant in the assertion of claims or the succession to claims.

In *Merrill v. National Bank of Jacksonville*, 75 Fed. 148, affirmed 173 U.S. 131, the Court of Appeals, in reliance upon other cases in this Court, framed a form of decree whereby the defendant receiver was required to certify to the Comptroller the amount of the claim which it was then assumed the Comptroller would pay as required by law.

What appellee desires is that all suits be brought in the District of Columbia rather than in the Federal courts where the banks are located. He successfully obtained the dismissal of the Comptroller in the present case because he was not a resident of the Eastern District of Michigan. No doubt the appellee could go so far, if his argument were good, as to claim that the Secretary of the Treasury is the only necessary defendant because he has general control and direction over the Comptroller under Sec. 1 of the National Bank Act. See appendix to appellee's brief. But no court has ever construed Sec. 194 of the National Bank Act to require either the Comptroller or the Secretary of the Treasury to be a defendant in a suit against a receiver in a "court of competent jurisdiction".

Appellee contends that the records are not in the hands of the receiver and speaks of three kinds of records, viz.: Those of the bank before receivership, those of the receiver relating to the bank, and those of the Comptroller relating to payment on bank claims. The statute makes no such division into different kinds of books. They all are bank records and the receiver and not the Comptroller, by Sec. 192 of the National Bank Act, is the one who has possession thereof. Furthermore, he did have possession of them at the time of the institution of the present case, including the checks signed by the Comptroller to pay to claimants who had not as yet appeared. This is made clear in the appellee's brief and in the affidavit filed in support of de-

fendant's motion to dismiss in the District Court (R.53-54). To be sure, counsel endeavors to cut the receiver in two by contending that his custody was as a representative of the Comptroller rather than as receiver. But appellee himself in his motion to dismiss denied that he was validly or properly appointed agent or representative of the Comptroller (R.48-49).

The records which were in the receiver's hands at the time of institution of suit were sent to the Comptroller only pursuant to stipulation in this case (R. 38-40) and it is agreed that they are to be returned if the Court directs the same.

Even if the records were in the possession of the Comptroller, it is less to expect him to cooperate with his receiver in making reports therefrom than it is to expect him to comply with judgments against the receiver, as all decisions on the subject have held he must do.

Appellee seeks to avoid the apparent inconsistency of having obtained the dismissal of the Comptroller as an unnecessary party in an earlier case (see our original brief, pp. 47-48) on the claim that the present receivership is closed. He likewise seeks to distinguish the many decisions holding that the Comptroller is not a necessary party by pointing out that in such cases the receiverships were not closed, although this Court and other courts considering the cases made no distinction on this account.

But the receivership in the present case is not closed. Appellant in his petition below averred that defendant herein at the time of institution of the suit was the present receiver of the bank (R. 3, 5). Defendant's motion to dismiss of course admitted this well-pleaded fact. Appellee appeared as receiver, filed a motion to dismiss as receiver

and signed a stipulation as receiver, as we pointed out in our original brief.

But appellee now claims that he was not a real receiver in that an affidavit was filed in support of the motion to dismiss (R. 49-54) in which it was asserted that on June 15, 1944, when final accounting of a predecessor receiver was approved, the receivership was "deemed technically closed" (R. 53). But the only statutory occasion for the closing of the receivership is when there is a surplus of moneys to be turned over to an agent for stockholders. See *United States v. Weitzel*, 246 U.S. 533. The appellee can point to no statutory right to "deem" receivership closed. Even in the affidavit it is admitted that the appellee Connolly was given a commission as receiver to act in incidental cases that might require action by a receiver. Appellee's brief admits that the Comptroller keeps permanent receivers of all defunct national banks. He has a supervising receiver who continues to pay checks on claims with respect to the national bank involved in the instant cause after the time the receivership is alleged to have been closed.

If the affidavit filed with the motion to dismiss in the District Court could be taken, as it cannot be, as a denial of the continued existence of the receivership it would not be permissible under Rule 12(b)(6) of the Federal Rules of Civil Procedure in effect at the time the motion was made. This rule of course requires defenses, with certain exceptions, to be asserted in a responsive pleading instead of in a motion to dismiss. While affidavits, or so-called "speaking motions", have been allowed on some jurisdictional matters and the like, or in elaboration of facts, they are not allowed in denial of facts averred in the plaintiff's complaint. *Gallup v. Caldwell*, 120 F. 2d 90 (CCA3);

Farrell v. District of Columbia Amateur Athletic Union, 153 F. 2d 647 (C.A.D.C.).

But appellee relies also on the fact that the Comptroller in a report to Congress said that this receivership was closed although Connolly was still receiver and the Comptroller maintains perpetual receivers. What was meant by "closed" was of course merely that the assets of the bank had been disposed of and the net amount remaining declared as dividends. Certainly the Comptroller's reports to Congress about banks' being finally "closed" are not very "final" since it appears in the same table 45 of the Comptroller's self-serving 82nd Annual Report to Congress for the year 1944, at page 169, that another receivership, that of the First National Bank of Lumberton, Mississippi, was during 1944 reopened.

What the contention comes down to is this: The Comptroller is a necessary party in suits against receivers on claims even though he had a receiver in office, provided the Comptroller has reported to Congress that the receivership is deemed to be closed. If, however, he later reports that it is deemed to be reopened, then he becomes an unnecessary party. Certainly the whim of the Comptroller cannot thus be allowed to decide when and against whom a court of competent jurisdiction may adjudicate a claim under Sec. 194.

At the time a final dividend is declared, of course, all of the bank assets will have been disposed of except the cash necessary to pay the final dividend. If a receivership may be deemed closed before this cash is paid out then indeed there is a simple way to defeat suits against receivers to collect claims. Thus "closing" would occur long before the end of the seven-year period of presumptive abandon-

ment. Even a claimant himself, if the Comptroller did not choose to pay, would have to go to Washington and sue the Comptroller and the Secretary of the Treasury there, even though he brought suit promptly after the declaration of the final dividend but unfortunately after the Comptroller had deemed the receivership closed.

It is late to overrule the numerous decisions of this Court holding that the Comptroller is not a necessary party, and especially so as this may be the last case where the question could possibly be raised. Now that the Federal Deposit Insurance Corporation is the receiver of national banks, the statute directly requires it and not the Comptroller to pay the dividends. 12 U.S.C. 264 (l) (4).

B. *Not a Suit Against the United States.* We do not deny that the receiver is an agent of the Federal Government. The national bank itself has its valid existence solely because it also is an agent of the Government. This has never been held to mean that suits cannot be brought against the bank or its receiver, any more than that suits cannot be brought against the receiver because he acts under the direction of the Comptroller.

Appellee relies on *Auten v. United States National Bank*, 174 U.S. 125, which of course allowed a claim in a suit against a receiver although he was held to be an agent of the United States. *Roth v. Hood*, 106 F. 2d 616 (CCA6), also relied upon by the appellee, entertained a claim against a receiver for specific property although the claim was denied on the merits. The claim was allowed in a suit against the receiver of a national bank in *Chemical National Bank v. Armstrong*, 59 Fed. 372 (CCA6), aff'd, 176 U.S. 618, upon which case appellee relies. Such cases are of course legion.

In the *Chemical National Bank* case it was pointed out that the appointment of the receiver transferred the bank assets to the receiver and the Comptroller in trust to apply the same in ratable distribution to the creditors.

O'Connor v. Rhodes, 79 F. 2d 146 (C.A.D.C.), relied upon by appellee, sustained among other things a suit by a bank receiver against the Attorney General of the United States who as alien property custodian obtained funds from the bank receiver. It was held that no interest of the United States was involved as the money of the alien property custodian was earmarked for a special purpose. Here the bank funds are held by the receiver or Comptroller solely for the special purpose of paying claims. The United States has no interest therein and claims none. *Richmond F. & P.R. Co. v. McCarl*, 62 F. 2d 203 (C.A.D.C.), cert. denied, 288 U.S. 615, likewise relied upon by appellee was one where it was held that the United States was not a necessary party where an injunction was sought to force the Comptroller General not to withhold money due plaintiff. Here money is due on claims by the express provision of Sec. 194 of the National Bank Act.

In *Haskins Bros. & Co. v. Morganthau*, 85 F. 2d 677 (C.A.D.C.), cert. denied, 295 U.S. 588, it is pointed out that the United States is not involved as a necessary party when the performance of a ministerial duty by an officer of the Government is required.

This is not a difficult case like *Larson v. Commerce Corp.*, 337 U.S. 682, cited by appellee. This is not a suit to obtain specific real property or chattels which Government officers are holding as United States property. The United States claims no property right. The Comptroller and his receiver are under an express statutory duty to pay claims out of the bank funds on hand. Even if the *Larson* case had any

applicability here, the Government officer is acting outside of his legal authority in refusing payment on claims as required by Sec. 194 of the Act.

If by any chance the United States were in effect a party, Congress has consented to such suit by making the Comptroller pay claims established by a court of competent jurisdiction. There is no distinction made by the statute between the original proof of the claim and proof of its transfer by operation of law or otherwise. If there were, then the cases we have cited allowing garnishment, subrogation and similar claims against national banks or receivers thereof would have been dismissed as suits against the United States, if appellee's contentions were valid.

The claim that escheat is not a succession to the claim of a prior owner is a play upon words. One who obtains garnishment, one who obtains right of subrogation, one who succeeds as administrator or the state which obtains by escheat are all successors and no one is making a claim against the United States when by suit against the bank itself or its receiver he endeavors to establish right to receive payment on the claim which the Federal statute requires be paid.

C. *Res Adjudicata.* It is timidly suggested as a reason for avoiding decision on the merits that prior decisions in the Sixth Circuit "may" render the case *res adjudicata.*

Res adjudicata was not pleaded nor urged until the case reached this Court.

We concur in the rule of *Cromwell v. County of Sac,* 94 U.S. 351, 352, that a prior judgment concludes parties and those in privity "not only as to every matter which was offered and received to sustain or defeat the claim or de-

mend, but as to any other admissible matter which might have been offered for that purpose." But the claim or demand in the three earlier cases was solely for Michigan to receive deposits in the bank where the claimant had failed to file claim with the Receiver. Appellee states that the prayers in the earlier cases were like the prayers in the present case, in that the plaintiffs sought a ruling that the receiver was bound by the Michigan statute. But the claims asserted and with respect to which it was alleged the receiver was bound were as to unproven deposits. This appears on the record in the petitions for *certiorari*, numbers 731 and 732, October term, 1941, filed in this Court in *Starr v. Schram*, with respect to which petitions this Court denied *certiorari* in 314 U.S. 695. In the record, at page 5 in this first suit, the fact averment as to the claim is stated as follows:

> "That your petitioner is informed and verily believes that the records of the defendant disclose that there are approximately one hundred twenty-five thousand one hundred six (125,106) individual deposit balances, totalling Two Million Thirty-eight Thousand Two Hundred Seventy-one Dollars and Forty-eight cents ($2,038,271.48), which appeared as liabilities upon the books of the First National Bank-Detroit as of its suspension on the 11th day of February, A.D. 1933, upon which no claims have been presented or filed with said Receiver or his predecessor, or upon which balances no demands have been made for payment by the persons who made such deposits, prior to the date hereof."

That this was the issue appears also in *Starr v. O'Connor*, 118 F.2d, 548, 550.

In fact, in 1938 when this prior case was started, the State could not have sought escheat under its statutes with

respect to proven claims. The receivership did not start until 1933, and seven years had not as yet elapsed within which a depositor who had proved his claim could be presumed to have abandoned it.

Starr v. Schram, 143 F.2d 561, was in substance a second hearing of the original case, the Receiver having filed an additional petition seeking to obtain the return from the State of dividends on unproven deposits which the Receiver had under the prior policy of the Comptroller voluntarily paid to the State of Michigan.

The third former suit, *Rushton v. Schram*, 143 F.2d 554, contained the same fact averments as to the State claim as the earlier cases, viz., claim was made as to unproven deposits and not to proven deposits as at present. While the record in this case is not on file with this Court, the averments in the case are set forth as an appendix to our reply brief in support of petition for *certiorari* in Docket Number 21 (Docket Number 553, October Term, 1948). While we are thus going outside the record of this case, it is appellee who now asserts *res adjudicata* and he should have brought up the pertinent part of the record in the prior case to substantiate his claim made in this Court for the first time. However, we do not need to look at the record in the prior cases because in the present case the court below made it clear (R. 68) that the prior cases involved this entirely different claim. It there described the present case as one relating to the application of Michigan's escheat laws to deposits where depositors have had their claims allowed and have since disappeared, and the court stated:

> "The fact that we encounter here proven claims rather than dormant deposits supplies no logical basis for a declination to apply settled doctrine."

While we believe that the "settled doctrine" did not apply to the present case, it is clear from the above wording that the prior cases were on different claims from the present one, and hence in the prior cases no "admissible matter" might have been "offered" to sustain or defeat the present claim.

In *Fishgold v. Sullivan Corp.*, 328 U.S. 275, 282, the prior decision was said to be on the "precise point".

D. *A State Decision Interpreting the Law is Neither Necessary Nor Possible.* Reliance is placed on *Federation of Labor v. McAdory*, 325 U.S. 450; *A.F. of L. v. Watson*, 327 U.S. 582; *Spector v. McLaughlin*, 323 U.S. 101, and other cases, with a view to postponing a decision here until the Michigan court has passed on the interpretation of its escheat law. In those cases an appropriate state proceeding was immediately available, and there were questions of state law which were "seriously doubtful".

However, the recent decision in *Propper v. Clark*, 337 U.S. 472, makes it clear that it is in the unusual case where this Court does not decide questions presented to it but delays the case in a lower court until a state court decision may be had. As there pointed out (p. 492), such procedure "is not to be used to impede the normal course of action where Federal courts have been granted jurisdiction of the controversy". While Justice Frankfurter dissented, it was solely because there was a seriously doubtful question of state law and a practical way to retain jurisdiction pending prompt state decision, and an unconscionable amount of time had not been used.

If we apply the reasoning of either the majority or dissenting opinions in the *Propper* case, it is clear that this is not a case for such delay.

Appellee's suggestion of a new suit to obtain a decision as to the meaning of the present statute is directly contrary to what he has himself pointed out in division I-A of his argument in referring to the pending *certiarori* petition. The Michigan statute involved in this case has been repealed. While the repealing law had a saving clause permitting the continuance of the present case, and full relief can be granted herein, a new case now started in a Michigan court would have to be on the new Michigan code, and hence could not interpret the repealed code. Appellee is thus hoist by his own petard.

Even if a decision on the interpretation of the law involved in this case were now possible of attainment in the Michigan courts, there is no Receiver now in Michigan upon whom to obtain service, and if there were, the Receiver would of course exercise his right to remove to Federal court. Furthermore, it would be asserted, as it is in the present case (erroneously, to be sure,) that the Comptroller is a necessary defendant; he would obtain dismissal for want of service upon him in Michigan, similarly to what he did in the present case. Hence, if appellee's claim were well founded, the case would have to be brought in the District Court of Columbia, and that Court and not the Michigan court would be interpreting Michigan law rather than the Court of Appeals for the Sixth Circuit, which is familiar with Michigan law because of the many cases involving such law there decided.

Judge McAllister, who participated in the decision of the present case, has long been a resident and lawyer of Michigan and is a former Supreme Court Justice of that State. This is like *Estate of Spiegel v. Commissioner*, 335 U.S. 701, 707-708, where this Court stated:

"The questioned ruling was made by three judges

> who were constantly required to pass upon Illinois law questions. One of the three judges has long been a resident and lawyer of Illinois. • • • • • Under the circumstances we will follow our general policy and leave undisturbed this Court of Appeals' holding on a question of state law."

This was true although this Court believed that reasonable arguments based on Illinois cases could be made to support either side of the question involved.

In the instant cause the court below found no difficulty in interpreting the Michigan escheat law. They were not impressed by tenuous arguments as to the non-applicability of that law to receivers of national banks. As we have pointed out, the court below found the Michigan law applicable, but held it invalid as "an unlawful interference with the liquidation of a national bank".

While of course the Court should avoid determining a constitutional question if a case can be properly decided on other grounds, there is no constitutional question in the present case. All admit that the National Bank Act is supreme in the field it covers and that national banks cannot be validly interfered with by state laws. The problem presented is: does the Michigan law invalidly interfere with the National Bank Act in the circumstances of this case?

In addition, it is apparent that the suggestions as to inapplicability of the Michigan statute to nationl banks in liquidation and the receivers thereof are not well founded and would be dismissed by any court in the State of Michigan or elsewhere.

Counsel refer to Sec. 4(b) of the Michigan Law (R. 17) where persons subject to the Act are defined. By use of

italics (the Michigan Legislature was content with roman type) an attempt is made to extend an exception of municipal corporations and officers thereof so as to have it cover also governmental departments, agencies and officials. If italics are to be inserted, a correct insertion would show the definition of "person" or "persons" to include:

> "a natural person, a copartnership, a company, a corporation, *except municipal corporations, or any officer thereof,* any government department, agency, instrumentality or official, a depository, a receiver, a trustee, a fiduciary, a debtor, a custodian, a liquidating officer, or any combination of natural persons."

It is apparent that the exception qualifies the word "corporation" and nothing else, in that municipal corporations or any officer thereof are excepted.

That it was not the intent to except government departments, agencies or officers, such as receivers of national banks, is made doubly clear by the fact that even appellee does not contend that the exception clause excludes depositories, receivers, custodians, and liquidating officers.

The asserted strained construction is not only unnatural, but unthinkable as having been intended by the Michigan Legislature. Of course exceptions in statutes are strictly construed. *Spokane & Inland R.R. v. U.S.*, 241 U.S. 344, 350; *Peidmont & Northern Ry v. Commission*, 286 U.S. 299, 311; *U.S. v. Scharton*, 285 U.S. 518, 521; and *United States v. McElvain*, 272 U.S. 633, 639.

Neither does the provision in the Michigan statute for signature by natural persons, partnerships, corporations and others, without mentioning government agencies or officials (Sec. 6, R. 18, 19) lead to any supposed exclusion

of receivers. The receiver is a natural person. If Federal Deposit Insurance Corporation were the receiver, it is a corporation.

Neither is anything gained by reference to Sec. 4(b) (R. 17) where a "depository" is defined to include any person who is indebted or accountable to any other person as depositor. Sec. 6 (R. 18) requires a report from a depository who is indebted or accountable to any other person.

The Receiver is not accountable solely to the Comptroller. The numerous cases we have previously cited where judgments have been rendered against receivers on claims of depositors or their successors show that the receiver is held accountable to depositors and their successor as well.

In fact, if the law defined "person" and "depository" so as to include only banks themselves and bank officers, nevertheless the receiver, as statutory assignee of the bank, would have to file reports. See *Hazen v. Hardee*, 78 F.2d 230, 232 (C.A.D.C.) previously quoted from.

In light of the tenuous character of any possible proposed interpretation of the Michigan law so as not to include receivers of national banks, the court below found the statute applicable, but as such invalid as repugnant to the National Bank Law.

Conclusion

The State of Michigan desires a decision on the merits and submits that that decision should reverse the Court of Appeals and should not be diverted by unsound attempts of the appellee to avoid it.

Respectfully submitted,

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OCTOBER TERM, ~~1948~~ 1949

No. ~~526~~ 24

STEPHEN J. ROTH, ATTORNEY GENERAL, SUCCESSOR TO EUGENE F. BLACK, ATTORNEY GENERAL, IN THE NAME AND ON BEHALF OF THE PEOPLE OF THE STATE OF MICHIGAN,

Appellant,

vs.

PRESTON DELANO, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES OF AMERICA, AND JOSEPH T. CONNOLLY, AS RECEIVER OF THE FIRST NATIONAL BANK-DETROIT, A NATIONAL BANKING ASSOCIATION, AND AS DETROIT REPRESENTATIVE, COMPTROLLER OF THE CURRENCY IN THE UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION OF APPELLEE TO DISMISS OR AFFIRM, AND STATEMENT OPPOSING JURISDICTION

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 566

STEPHEN J. ROTH, ATTORNEY GENERAL, SUCCESSOR TO EUGENE F. BLACK, ATTORNEY GENERAL, IN THE NAME AND ON BEHALF OF THE PEOPLE OF THE STATE OF MICHIGAN,

Appellant,

vs.

PRESTON DELANO, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES OF AMERICA, AND JOSEPH T. CONNOLLY, AS RECEIVER OF THE FIRST NATIONAL BANK-DETROIT, A NATIONAL BANKING ASSOCIATION, AND AS DETROIT REPRESENTATIVE, COMPTROLLER OF THE CURRENCY IN THE UNITED STATES OF AMERICA,

Appellee

MOTION OF APPELLEE TO DISMISS OR AFFIRM

Now comes Joseph T. Connolly, as Receiver of the First National Bank-Detroit, a national banking association, and as Detroit Representative of the Comptroller of the Currency of the United States, appellee herein, by his counsel, and, under Supreme Court Rule 12, section 3, moves this Honorable Court to dismiss with costs the appeal taken

herein to this Court by appellee, or, in the alternative, to affirm the judgment below, for the following reasons:

1. There is no jurisdiction, under the provisions of Title 28, U. S. Code, section 1254(2), for this appeal.

2. There is no substantial federal question presented in this action.

The foregoing reasons are more fully set forth in the statement opposing jurisdiction included herewith.

Statement Opposing Jurisdiction

Appellee, believing that there is no jurisdiction, under the provisions of Title 28, United States Code, section 1254(2) for this appeal, and that there is no substantial question involved here, files this statement opposing jurisdiction on appeal and in support of his motion included herewith.

Statement of the Case

The instant case is but one chapter of a controversy, which has now extended over eleven years, in which it has repeatedly been held that the escheat acts of the State of Michigan do not apply to the liquidation, under the National Bank Act, of the insolvent First National Bank-Detroit, a national banking association. *Starr* v. *O'Connor* (1941), 118 F. 2d 548 [cert. den., 314 U. S. 695]; *Rushton* v. *Schram* (1944), 143 F. 2d 554; *Starr* v. *Schram* (1944), 143 F. 2d 561; *Black* v. *Delano* (1948), 170 F. 2d 966. No one chapter of this controversy can be divorced from the others, and all are referred to in the opinion of the Court of Appeals in the instant case.

In a letter of May 28, 1937, written in response to a letter from the Attorney General of Michigan, the Comptroller of the Currency of the United States advised the

Attorney General of his opinion and position that the escheat acts of Michigan "are not applicable to closed national banks." As a result, on February 14, 1938, the Attorney General filed a declaratory judgment action against the Comptroller of the Currency and the receiver of First National Bank-Detroit, praying for a declaration that the Michigan escheat acts "are applicable to First National Bank-Detroit, a national banking association, now insolvent and in the process of liquidation." On appeal, the Circuit Court of Appeals for the Sixth Circuit held the acts inapplicable, the receivership being "immune" from state control since the National Bank Act provides a complete system for winding up the affairs of an insolvent national bank and distributing its effects. *Starr* v. *O'Connor* (1941), 118 F. 2d 548.

While a petition for rehearing was pending, the Michigan legislature passed a new escheat act, Act 170 of the Public Acts of Michigan for 1941, and it was formally called to the attention of the Court of Appeals. Thereafter, his petition for rehearing was denied, and the Attorney General filed two petitions for certiorari with the United States Supreme Court. These were both denied. *Starr* v. *Schram* (1941), 314 U. S. 695.

On March 14, 1942, a successor Attorney General of Michigan filed another declaratory judgment action, based on the Michigan escheat acts as amended by the new Act 170. The prayer of the petition was identical with that in the first action, except for mention of the new Act 170 therein. From an adverse decision, the Attorney General again appealed. The result is the decision of the Court of Appeals for the Sixth Circuit, reported in *Rushton* v. *Schram* (1944), 143 F. 2d 554, holding the amended law likewise not applicable, and the majority said it did not apply retroactively and that it was not so intended. On the same day, the Court of Appeals handed down another decision in this contro-

versy, *Starr* v. *Schram* (1944), 143 F. 2d 561, which denied the bank receiver the right to recover money erroneously paid by him to the State of Michigan upon its demands under the escheat acts, prior to 1937, and prior to the above cited decision, *Starr* v. *O'Connor, supra.* The immunity of the State to suit, without its consent, was one of the grounds for the decision.

Upon applications filed, the Supreme Court granted extensions of time to apply for certiorari, to the Attorney General in the *Rushton* case and to the receiver in the *Starr* case. In his application, the receiver advised the Supreme Court that, under direction of the Comptroller of the Currency, he was attempting to arrange an agreement to dispose *finally of the entire controversy.* As part of its files and records, the Supreme Court may take judicial notice of these applications and their contents. *United States* v. *California Co-Op. Canneries* (1929), 279 U. S. 553, 555. Certiorari petitions were not thereafter filed, since, as may be deduced from that fact, a settlement agreement was reached, which appellee believes did and does dispose of this entire escheat controversy. The agreement itself is not a part of the record here, since it is a matter of affirmative defense, which, as yet, appellee has not been called upon to make in the instant case.

The liquidation of the insolvent First National Bank-Detroit was completed and the receivership closed as of June 15, 1944, as reported to Congress in the Comptroller of the Currency's eighty-second annual report to Congress (Table 45, p. 169 and note 10), the contents of which federal courts may take judicial notice. *Texas & Pacific Ry. Co.* v. *Pottoroff* (1934), 291 U. S. 245, 254; *Fletcher* v. *Jones* (C. A., D. C., 1939), 105 F. 2d 58, 61 [cert. den., 308 U. S. 555]; *Hardee* v. *Washington Loan & Trust Co.* (C. A., D. C., 1937), 91 F. 2d 314, 315.

On June 25, 1946, *two years after* the completion and final closing of the bank liquidation, this *third* declaratory judgment action was filed. The main prayer of the petition is the same as in the *Rushton* case, except that it speaks of the bank having now been liquidated. *Exactly the same escheat act is involved.* Appellant says it is different because he refers to *dividends* on claims proved but not yet paid. The Court of Appeals found no essential difference. It said it was fought on essentially the identical legal grounds as were the previous cases. *For the third time the Court of Appeals held the state act inapplicable in the circumstances here presented.* Appellant now attempts to appeal under section 1254(2) of Title 28, United States Code.

The Comptroller of the Currency was originally named as a defendant. The action was dismissed as to him because of a lack of jurisdiction over his person. Appellant did not appeal from that dismissal. Hence the Comptroller of the Currency was not and is not a party, and was not before the courts below.

Discussion

1. *State Acts Not Held Invalid*

Since passage of the Jurisdictional Act of 1925, it has been held to be the intent of Congress, through the Judicial Code, to restrict the obligatory appellate jurisdiction of the Supreme Court to a narrow class of cases, and to foreclose an appeal as of right whenever the prescribed conditions have not been rigorously fulfilled. *Memphis Natural Gas Co.* v. *Beeler* (1942), 315 U. S. 649, 651; *Phillips* v. *United States* (1914), 312 U. S. 246, 250.

The Court of Appeals, in its opinion in the instant case, did not hold that the Michigan escheat acts are invalid as repugnant to the provisions of the National Bank Act.

Appellant says the decision "in substance" determines this. An analysis of the proceedings and the decision shows this is not true.

The main prayer of appellant's petition for declaratory judgment asked for a declaration that the Michigan escheat act, as amended by Act 170, "is *applicable* to the First National Bank-Detroit, a national banking association, heretofore declared insolvent and since such insolvency liquidated". (Emphasis ours.) Appellee moved to dismiss the petition as to him because it failed to state a cause of action and because of a lack of jurisdiction in the court over the subject-matter. Contrary to appellant's statement, at no time did appellee say or urge that the Michigan law was invalid.

Appellee's position in both courts has been, in support of his claim that the petition did not state a cause of action against him: (1) That the National Bank Act provides a complete and exclusive system for the winding up of the affairs of an insolvent national bank, hence, the state statutes do not apply in that field. Therefore, since appellant's ground for relief was based on an inapplicable statute, no cause of action was stated. (2) That, in any event, no cause of action was stated against appellee because, as a matter of law, he had no power, authority or duties with regard to the distribution of moneys made from the liquidation of the insolvent national bank. That all such moneys were paid over to the Comptroller of the Currency, whose right and duty it was to make all distribution thereof, and who was not before the court. Title 12, U. S. Code, sections 192, 193, 194; R. S., sections 5234, 5235, 5236, respectively.

In sustaining, on the merits, the District Court's dismissal of appellant's petition for a declaration that the Michigan escheat act "is applicable" to the national bank liquidation, the Court of Appeals merely answered in the negative. It held it was not applicable. In saying, in its

opinion, that the action brought "to apply" the Michigan statute "in the circumstances constitutes an unlawful interference with the liquidation of a national bank", it is saying no more than that the Michigan act does not apply in a manner so as to infringe on rights, duties, privileges or immunities provided under federal law. The Court of Appeals said its holding herein was upon the same principles and authorities discussed in its previous opinions.

In *Rushton* v. *Schram, supra*, the Court of Appeals discussed the application of the *same* act here involved, which does not name national banks or national bank receiverships, and held it did not apply retroactively "to dormant deposits in a national bank in course of liquidation" (p. 557). In none of its four opinions concerning this escheat controversy has the Court of Appeals ever characterized any portion of the Michigan escheat law as invalid legislation. It has never questioned the right and power of the Michigan legislature to enact it. In each opinion it has been concerned only with construction of the law and the extent of its application.

It is well established that an attack, in a state court, upon a state statute on the ground that it infringes upon a party's federal rights, privileges or immunities does not sustain an appeal under former section 237(a) of the Judicial Code [Title 28, U. S. Code, sec. 344(a)—now section 1257(2) thereof], where the decision of the state court upholds the application of the statute. *Charleston Fed. Sav. & L. Assn.* v. *Alderson* (1945), 324 U. S. 182; *Memphis Natural Gas Co.* v. *Beeler*, supra; *Baltimore National Bank* v. *State Tax Commission* (1935), 296 U. S. 538 [from *State Tax Comm.* v. *Balt. Nat. Bk.*, 169 Md. 65, 180 A. 260]. Such an attack does not draw in question the validity of the state statute.

It is equally true that where the issue raised by a party in a federal court is that his rights, privileges, duties or immunities under the Constitution, treaties or laws of the

United States prevent the application of a state statute to him or his property, and the Court of Appeals decision is against the claimed application, no appeal can be taken under section 1254 (2) of Title 28, U. S. Code [formerly sec. 240(b) of the Judicial Code—28 U. S. C., sec. 347(b)]. Again, the validity of the state statute is not drawn in question. *Reeves* v. *Williamson* (1942), 317 U. S. 592; *Gamble* v. *Daniel* (1930), 281 U. S. 705.

In *Reeves* v. *Williamson*, supra, the Supreme Court dismissed an appeal for want of jurisdiction under section 240(b) of the Judicial Code, the appeal being from the decision of the Court of Appeals (6th Cir.) in *Re Kentucky Fuel Gas Co.* (1942), 127 F. 2d 657. This case involved an attempt by the Kentucky Commissioner of Revenue to collect a tax, levied under a state statute, upon funds deposited, under a federal statute, in a United States postal savings depositary by a receiver of a corporation being reorganized under federal law. The question was stated by the Court of Appeals to be "whether or not imposition of the tax constitutes a legitimate exercise of the state taxing power". The Court of Appeals found that the state statute did embrace, by a catchall provision, the postal savings deposits, but held that the tax imposed thereunder could not be collected, "since the tax is plainly discriminatory and substantially burdens an instrumentality of the federal government".

In *Gamble* v. *Daniel*, *supra*, the Supreme Court held it was without jurisdiction, under section 240(b) of the Judicial Code, of the appeal taken from the Court of Appeals (8th Cir.) decision therein, reported (1930) in 39 F. 2d 447. Here a trust company, organized under the Nebraska law, became insolvent, and its books, accounts and property were taken over for liquidation, under State statutes, by the Nebraska Department of Trade and Commerce. Shortly thereafter, the trust company was adjudicated a bankrupt

under Federal law, and a receiver in bankruptcy appointed for it. His demands for the company books, accounts and records were refused by the State, which claimed a right to proceed under State law. In sustaining the Federal court summary turnover order, the Court of Appeals stated that the Constitution gives Congress the power to occupy the entire field of bankruptcy, that the Bankruptcy Act superseded the State law, at least in so far as it relates to the distribution of property, and that "there can be no question of the precedence of the Bankruptcy Act nor of the duty of the federal courts to sustain that act and the jurisdiction, rights and duties thereunder."

In the case at bar, the Court of Appeals did no more than was done in the *Reeves* and *Gamble* cases, even less toward holding invalid a state statute than it did in the *Reeves* case. It merely held that the State act does not apply because the field is occupied by the Federal law—this in answer to appellant's request for a declaration on this issue.

Where, as here, the issue is as to which of two statutes applies, where they provide mutually exclusive procedures or rights, the validity of a statute is not thereby drawn in question. *P. J. Carlin Construction Co.* v. *Heaney* (1936), 298 U. S. 637 [from *Heaney* v. *Carlin Construction Co.* (1935), 269 N. Y. 93, 199 N. E. 16]; *Bradford Electric Light Co.* v. *Clapper* (1931), 284 U. S. 221; *North Dakota* v. *Olson* (1929), 280 U. S. 528 [from 33 F. 2d 848].

The issues decided in the cases cited by appellant as sustaining jurisdiction on this appeal go to the power of the State to enact the statute in question because of Federal constitutional prohibitions against so legislating. In each of those cases a State statute was held invalid. That was not discussed, decided, nor an issue in the case at bar.

2. *Absence of Indispensable Party.*

Under the ground to dismiss appellant's petition for lack of jurisdiction in the court over the subject-matter, appellee raised the question of the Comptroller of the Currency not being before the court.

Under the provisions of the National Bank Act applicable herein, all duties of the bank receiver are performed under the direction and control of the Comptroller, and he must make report of all his acts and proceedings to the Comptroller. The receiver's duties go only to the liquidation of the bank assets, under the direction and control of the Comptroller. All moneys so made must be paid over to the Treasurer of the United States, where they are subject to the order of the Comptroller. All distribution of the moneys so made is a function of the Comptroller *alone*. The receiver has no duties with regard thereto. Title 12, U. S. Code, sections 192 and 194; R.S., sections 5234 and 5236. In fact, Congress has placed on the Comptroller the entire responsibility for the winding up of the affairs of an insolvent national bank. *Ex parte Chetwood* (1896), 165 U. S. 443, 458; *United States* v. *Weitzel* (1918), 246 U. S. 533, 540.

As the party charged with the duty of administering the affairs of the insolvent First National Bank-Detroit, as the *sole* party authorized to make distribution of the proceeds of the liquidation, and hence the only party with complete records thereof, it is the Comptroller's rights and interests that appellant's action herein infringes upon, and no other person's. Obviously, the Comptroller is an indispensable party to the granting of the relief appellant seeks. *Webster* v. *Fall* (1925), 266 U. S. 507; *Gnerich* v. *Rutter* (1924) 265 U. S. 388; *Warner Valley Stock Co.* v. *Smith* (1897), 165 U. S. 28.

Even had appellee not raised the question, the court, *sua sponte*, could and should have inquired into the absence of the indispensable party, and could not grant the prayers of appellant's petition in the Comptroller's absence from the action. *Minnesota* v. *Northern Securities Co.* (1902), 184 U. S. 199, 235; *Drachett Co.* v. *Chamberlain Co.* (1936), 81 F. 2d 866, appeal dismissed and cert. den., 299 U. S. 503-4.

3. *No Substantial Question Involved.*

There can hardly be a substantial Federal question involved in an action which does not include a party absolutely essential to a granting of the relief requested. That is the situation in the case at bar. Further, if the appeal be allowed, all that can be reviewed is the claimed Federal question involved—whether the Michigan statute applies in the circumstances here presented. In the event of a reversal on the Federal question, the case would have to be returned to the lower courts where dismissal would result on the jurisdictional ground, leaving any ruling here but a matter of academic interest. Title 28, U. S. Code, section 1254(2).

Further, only a Michigan statute, not one of general application, is involved in this case, and that statute *has now been superseded by an entirely new escheat code in Michigan, which repeals all previous escheat statutes of the state.* Act 329 of the Public Acts of Michigan for 1947, section 65 (Mich. Sts. Ann., sec. 26.1053(65)). It is true there is a savings clause as to pending suits or proceedings. However, any declaration under a statute in existence only as to pending litigation can scarcely be termed the decision of a substantial question.

4. *Res Adjudicata.*

In reality the prior escheat decisions of the Court of Appeals for the Sixth Circuit are *res adjudicata* as to the instant action. The parties are identical. The prayers in all the actions are identical. As the Court of Appeals said, the "present battle is fought upon essentially the same legal grounds upon which former contests have been waged." Appellant cites *Anderson National Bank* v. *Luckett* (1944), 321 U. S. 233, and *United States* v. *Klein* (1938), 303 U. S. 276. He does not claim these decisions are in conflict with the Court of Appeals decision in the instant case. As a matter of fact, the Court of Appeals considered the *Anderson* case in its last *two* opinions, and the *Klein* case *three* times. It has had no difficulty in distinguishing the holdings in these cases in each instance. These decisions did not deal with insolvent national banks for the liquidation of which Congress has provided a complete code under which the Comptroller of the Currency is charged with the duty of locating creditors, and distributing dividends to the true owners.

It is submitted that there is no substantial question here involved.

5. *Decision Below is Correct.*

That the Court of Appeals is and has been correct in its holding, throughout this controversy, that the Michigan escheat acts are not applicable in the circumstances presented is clear.

It has long been held that the National Bank Act provides a complete system for the winding up of insolvent national banks, including all steps for the distribution of their effects. It covers the field, to the exclusion of other law. *Cook County National Bank* v. *United States* (1883), 107

U. S. 445, 448; *Davis* v. *Elmira Savings Bank* (1896), 161 U. S. 275; *Easton* v. *State of Iowa* (1903), 188 U. S. 220.

Appellant argued below that the Michigan acts only provide for a change in dominion of the obligation to pay ratable dividends. However, Congress has made this a dominion of the Comptroller, and only Congress can change it. Further, if Congress has a constitutional power to regulate a particular subject, and it does regulate it in a certain manner and form, a state legislature may not infringe thereon, by way of complementary legislation or otherwise. What Congress does prescribe indicates that it does not intend there shall be any further legislation to act upon the subject-matter. *Easton* v. *State of Iowa, supra*, at page 237.

An analysis of the Michigan act itself shows that, by its terms, it is not applicable here. It is stated to apply to "each person within this state who or which as a depository is indebted or accountable to any other person for money, credits, securities or property of any kind". Section 6 of Act 170. Section 4b defines depository to include any person "who or which has in his or its possession or under its control any property • • • for which he or it is indebted or accountable to any other person as depositor". The Comptroller is not within Michigan, and the receiver is neither indebted nor accountable to anyone other than the Comptroller. Title 12, U. S. Code, sec. 194; R.S., sec. 5234.

Conclusion

Appellee respectfully submits that there is a want of jurisdiction herein for an appeal under Title 28, U. S. Code, section 1254(2), and respectfully urges that his motion filed herewith be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 24

STEPHEN J. ROTH, Attorney General, Successor to Eugene F. Black, Attorney General, in the name and on behalf of the people of the State of Michigan, Appellant

v.

PRESTON DELANO, Comptroller of the Currency of the United States of America, and JOSEPH T. CONNOLLY, as Receiver of the First National Bank—Detroit, a National Banking Association, and as Detroit Representative, Comptroller of the Currency of the United States of America.

On Appeal From the United States Court of Appeals for the Sixth Circuit.

BRIEF FOR APPELLEE

OPINIONS BELOW.

The district court wrote no opinion. The opinion of the Court of Appeals for the Sixth Circuit (R. 66-68) is reported at 170 F. 2d 966.

JURISDICTION.

The judgment of the court of appeals was entered on November 30, 1948 (R. 66). The petition for appeal was filed and allowed on January 26, 1949 (R. 70, 73). The case was docketed in this Court on February 16, 1949. Jurisdiction was invoked under 28 U.S.C. 1254(2). On March 28, 1949, further consideration of the question of jurisdiction and of the motion to dismiss or affirm was postponed to the hearing of the case on the merits (R. 76).

QUESTIONS PRESENTED.

Relying on its prior decisions in suits brought by the Attorney General of Michigan, seeking a declaration that certain Michigan discovery and escheat laws are applicable to the First National Bank—Detroit, a national bank in liquidation, the Court of Appeals for the Sixth Circuit here affirmed the refusal of the district court to declare such Michigan laws applicable to the liquidated First National Bank—Detroit. The questions presented to this Court are:

1. Whether an appeal lies from the decision of the Sixth Circuit under 28 U.S.C. 1254(2).

2. Whether this Court should pass upon the validity of the application of the Michigan discovery and escheat law to this liquidated national bank. The answer to this question depends, in turn, upon

   a. Whether the Comptroller of the Currency of the United States, as to whom this suit was

dismissed for lack of jurisdiction, no appeal having been taken from the order of dismissal, is an indispensable party to this action.

b. Whether this suit is barred under the doctrine of *res judicata*.

c. Whether this is a suit against the United States to which the United States has not consented.

d. Whether the absence of an authoritative state court decision as to the scope of the Michigan statute should preclude a decision by this Court as to the validity of that statute.

3. If the above questions be answered adversely to our contentions, a further question presented is whether the attempted application to a liquidated national bank of the Michigan discovery and escheat laws constitutes an unconstitutional interference with the Federal Government.

STATUTES INVOLVED.

28 U.S.C. 1254(2) and the pertinent provisions of the National Bank Act and the Michigan statute are set forth in Appendix A, *infra*, pp. 60-67.

STATEMENT.

This action was brought by the Attorney General of the State of Michigan against the Comptroller of the Currency of the United States and Joseph T. Connolly, as receiver of the First National Bank—Detroit, a National Banking Association, and as Detroit representative of the Comp-

troller of the Currency, for a judgment declaring (1) the Michigan discovery and escheat statute, as amended, applicable to the previously liquidated First National Bank—Detroit, and (2) the defendants subject to the provisions of the statute (R. 3-15). The Comptroller of the Currency appeared specially and moved to dismiss as to him on the ground that he was not subject to the jurisdiction of the United States District Court for the Eastern District of Michigan (R. 46). Connolly appeared generally as receiver and as Detroit representative of the Comptroller of the Currency and moved to dismiss for lack of jurisdiction over the subject matter and on the merits (R. 48). An affidavit by R. B. McCandless, Deputy Comptroller of the Currency in direct charge of the Division of Insolvent National Banks and Insolvent National Bank Receiverships, was filed in support of the motion to dismiss (R. 49). These motions were granted (R. 58). No question was raised on appeal with respect to the dismissal of the petition as to the Comptroller and the order of dismissal as to Connolly was affirmed on the merits (R. 66, 68).

First National Bank—Detroit, a national banking association, closed its doors on February 11, 1933, and did not thereafter resume the conduct of normal banking business (R. 4). On March 13, 1933, a Conservator was appointed for the bank, and, on May 11, 1933, a receiver was appointed under applicable provisions of the National Bank

Act (R. 4, 49). Under the direction of the Comptroller of the Currency, in accordance with the National Bank Act (12 U.S.C. 192), the receiver took possession of the books, records, and assets of the bank, and proceeded to collect its debts, dues and claims (R. 5). C. O. Thomas, the first appointed receiver, remained as such until August 15, 1934, when he was succeeded by B. C. Schram (R. 4).

Prior to the appointment of the receiver on May 11, 1933, a forty (40%) per cent distribution by way of release was made available to creditors and depositors of the bank to aid in relieving the emergency confronting the citizens of Detroit (R. 4, 6, 50). Because of this emergency, the normal procedure of the Comptroller's office in the payment of dividends to depositors and creditors was not followed (R. 50).

Under the applicable provisions of the National Bank Act (12 U.S.C. 192 and 194), (Appendix A, *infra*, pp. 62-64), all moneys realized from liquidation of the bank assets are paid over by the receiver to the Treasurer of the United States, subject to the order of the Comptroller of the Currency. The Comptroller may deposit this money in any regular government depositary, or in any state or national bank located in the city wherein the insolvent national bank is located. Banks accepting such deposits are required to deposit collateral with the Treasurer of the United States, as in the case of

other federal government funds. The Comptroller of the Currency has the statutory duty to pay ratable dividends to the depositors and creditors of the liquidated bank out of the moneys realized from the liquidation of the bank assets.

Even after the first 40% distribution, the Detroit situation still merited emergency measures. A total of 544,630 claims were proved, aggregating $333,173,379.40. The number of claimants was later reduced to 160,271 by the acquisition of a large group of small claims by a group of large depositors. The handling of dividend payments on these claims presented a problem beyond the Comptroller's office space and clerical help. The Comptroller of the Currency, therefore, delegated to the receiver temporary authority to make the distribution of dividends which, under the statute, it was the Comptroller's duty to make. Funds were transferred by the Comptroller of the Currency to special dividend accounts subject to the check, for dividend purposes only, of the receiver. Pursuant to this delegation of authority, the receiver drew checks on the special dividend accounts for payment of a 10% dividend payable on November 15, 1933, a 20% dividend payable on November 30, 1934, and a 10% dividend payable on May 16, 1938. (R. 50-51.) These, with the releases prior to the appointment of a receiver, totalled eighty (80%) per cent to depositors and creditors (R. 51).

After these distributions had been made, the

dividend payment procedure normally pursued under the National Bank Act was followed. The so-called fifth dividend for the remaining 20% of the principal balance on claims was paid on November 1, 1940, by checks drawn by the Comptroller of the Currency against an account maintained in the name of the Comptroller of the Currency. The same was true of the sixth, the interest, dividend paid on December 7, 1942. (R. 51-52.)

To complete the transition to normal procedure, on May 29, 1944, all the bank accounts that had been maintained subject to the receiver's check, under his delegated authority, were closed, and all outstanding receiver's checks covering the distributions made by him were cancelled. Payment was stopped on all checks theretofore delivered but not presented by the holders for payment. New accounts were opened in the Detroit depositary in the name of "Comptroller of the Currency, for the benefit of the Creditors of the First National Bank—Detroit, First Dividend," and similarly for the second, third and fourth dividends. As concerned the delivered but unpresented checks on which payment had been stopped, an equivalent sum in money was placed in the Comptroller's Washington depository bank, secured by the proper collateral deposit with the Treasurer of the United States. When these checks thereafter were presented for payment to the former Detroit depository, they were forwarded to the Comptrol-

ler in Washington who drew his new check on his Washington depository in payment to the claimant. In the case of the voided undelivered checks, the Comptroller drew his checks in favor of the claimants, on his accounts with his Detroit depository, and entrusted these checks to the receiver for delivery on his behalf. (R. 51-52.) All divided payment procedure was then in conformity with that normally followed in national bank receiverships.

B. C. Schram, as successor to C. O. Thomas, continued in charge of the First National Bank—Detroit receivership until June 15, 1944, when the receivership was closed after all remaining assets thereof had been sold to the First Liquidating Corporation, of Detroit, Michigan, under order of court dated September 16, 1942 (R. 52-53). This closing was subject to termination of certain pending litigation and a final accounting with the First Liquidating Corporation. Such litigation was terminated, and the final accounting was made as of December 11, 1944. This final closing of the First National Bank—Detroit receivership, as of June 15, 1944, was reported to Congress in the Comptroller of the Currency's eighty-second annual report to Congress, for the year 1944.[1]

At the termination of every national bank receivership there are invariably numerous dividend

[1] See Table No. 45 beginning at page 164 of the report, and note the above information on page 169 opposite item No. 2299, and in note 10, which apply to the First National Bank-Detroit receivership.

checks uncalled for by creditors. The practice is to forward these to the Comptroller's office in Washington where efforts to effect delivery are continued. In the case of the First National Bank—Detroit receivership, the number of undelivered dividend checks was multiplied over the normal number by reason of the size of the receivership. (R. 53.) To reduce the load of detail and correspondence in the office of the Comptroller in Washington, however, Joseph T. Connolly, an employee of the Comptroller, was sent to Detroit to accomplish further dividend check deliveries in Detroit, and, at the same time, to process the multitude of records preparatory to their final deposit in the National Archives (R. 53). He performed these functions as an employee of the Comptroller and not as a receiver (R. 54).

The termination of a national bank receivership usually leaves certain incidental matters for completion. Releases which have been overlooked or later become advisable, or further real estate documents, such as mortgage discharges where the originals have been lost, for example, may have to be executed. The Comptroller's practice is to maintain what amounts to a perpetual receiver for each closed national bank, even after the receivership is deemed finally closed, to care for such incidental matters. This is usually an employee in the Comptroller's office. Mr. Connolly was given this commission. (R. 53-54.)

Mr. Connolly so functioned in Detroit until June 30, 1946, when, in accordance with plans previously made, all receivership records were shipped to Washington, most of them to be lodged in the National Archieves, and Mr. Connolly's office in Detroit was closed. Such dividend checks as were still undelivered were shipped to the Comptroller's office in Washington. (R. 53.)

The instant case is but one chapter of a controversy, which has now extended over eleven years, in which it has repeatedly been held that the escheat acts of the State of Michigan do not apply to the liquidation, under the National Bank Act, of the insolvent First National Bank—Detroit, a national banking association. *Starr* v. *O'Connor*, 118 F. 2d 548 (C.A. 6), certiorari denied *sub nom. Starr* v. *Schram*, 314 U.S. 695; *Rushton* v. *Schram*, 143 F. 2d 554 (C.A. 6); *Starr* v. *Schram*, 143 F. 2d 561 (C.A. 6); *Black* v. *Delano*, 170 F. 2d 966 (C.A. 6).

In a letter of May 28, 1937, written in response to a letter from the Attorney General of Michigan, the Comptroller of the Currency of the United States advised the Attorney General of his opinion that the escheat acts of Michigan "are not applicable to closed national banks." As a result, on February 14, 1938, the Attorney General filed a declaratory judgment action against the Comptroller of the Currency and the receiver of First National Bank—Detroit, praying for a declaration that the Michigan escheat acts "are applicable to

First National Bank—Detroit, a national banking association, now insolvent and in the process of liquidation." On appeal, the Court of Appeals for the Sixth Circuit held the acts inapplicable on the ground that the receivership was "immune" from state control since the National Bank Act provided a complete system for winding up the affairs of an insolvent national bank and distributing its effects. See Record in Nos. 731 and 732, October Term, 1941.

While a petition for rehearing was pending, the Michigan legislature passed a new escheat act, Act 170 of the Public Acts of Michigan for 1941, and it was formally called to the attention of the court of appeals. *Rushton* v. *Schram,* 143 F. 2d 554, 555 (C.A. 6). Thereafter, his petition for rehearing having been denied, the Attorney General filed two petitions for certiorari with this Court. These were both denied. *Starr* v. *Schram,* 314 U.S. 695.

On March 14, 1942, a successor Attorney General of Michigan filed another declaratory judgment action, based on the Michigan escheat acts as amended by the new Act 170. The prayer of the petition was identical with that in the first action, except for mention of the new Act 170 therein. From an adverse decision, the Attorney General again appealed. In *Rushton* v. *Schram,* 143 F. 2d 554, the amended law was held not applicable and in *Starr* v. *Schram,* 143 F. 2d 561, decided the same

day, the inapplicability of the state escheat laws to a national bank in liquidation was reiterated although the receiver was denied the right, in that proceeding, to recover amounts he had previously paid over to Michigan authorities.

Upon applications filed, this Court granted extensions of time to apply for certiorari, to the Attorney General in the *Rushton* case and to the receiver in the *Starr* case. In his application, the receiver advised the Court that, under direction of the Comptroller of the Currency, he was attempting to arrange an agreement to dispose finally of the entire controversy. A settlement agreement was reached and certiorari petitions were not thereafter filed.

The liquidation of the insolvent First National Bank—Detroit, was completed and the receivership closed as of June 15, 1944, as reported to Congress in the Comptroller of the Currency's eighty-second annual report to Congress (Table 45, p. 169 and note 10).

More than two years later, after all arrangements had been made for delivery of all files and records to Washington, a demand, by letter dated June 20, 1946, was addressed to Mr. Connolly, as receiver, by the Michigan State Board of Escheats for a report covering all undelivered and all delivered but unpresented dividend checks on claims received, passed upon, adjudicated and approved by the bank receiver and the Comptroller of the Currency, concerning which there had been no dealings or

transactions for a specified period. The letter further referred to funds segregated for the payment of the unpresented checks and of the undelivered checks being in the possession of or under the control of, said receiver and the Comptroller. (R. 32-34.)

Five days later, on June 25, 1946, the instant action was filed, and an order to show cause, with a temporary restraining order, issued to force retention of checks, funds and records in Michigan (R. 35). By subsequent agreement, Connolly was permitted to close his office in Detroit and to proceed with the shipment of records to Washington (R. 38). The temporary restraining order was then dissolved and the order to show cause dismissed (R. 40).

The main prayer of the petition in this third declaratory judgment action is the same as in the *Rushton* case, except that it speaks of the bank having now been liquidated. The same escheat act is involved. The court of appeals again held the state act inapplicable "as an unlawful interference with the liquidation of a national bank upon the same principles and authority fully discussed in our previous opinions" (R. 68).

SUMMARY OF ARGUMENT.

I.

A. This case arises under a Michigan statute which has been repealed and it is saved only as a "suit or proceeding" "pending" at the time of re-

pealer. Consequently, the practical effect on these parties of the issuance of the declaratory judgment here sought is problematical. Moreover, the establishment of the Federal Deposit Insurance Corporation and the role assigned it in future liquidations of national banks will sufficiently alter the situation arising out of such liquidations as to drastically diminish the future importance of the precise substantive questions, answers to which are here sought by the appellant. Consequently, there would seem to be no warrant for review of the decision below by this Court unless such review is rendered obligatory by 28 U.S.C. 1254(2).

But 28 U.S.C. 1254(2) provides for an appeal to this Court only when a court of appeals has held a state statute invalid. That is not the case here. In ruling that "the present action brought by the State of Michigan to apply its laws of escheat in the circumstances related constitutes an unlawful interference with the liquidation of a national bank," the court below did not pass on the validity of the laws themselves but, rather, on their application. This Court has held such a ruling to be non-appealable. *Reeves* v. *Williamson*, 317 U.S. 593. The prior decisions upon which the court below relied for its judgment in this case plainly express that court's view that the Michigan statute is inapplicable to the liquidation of the national bank here involved. That is an interpretation of a state statute rather than an invalidation. Consequently, an appeal does not lie.

B. The appellant's failure to obtain jurisdiction over the Comptroller of the Currency bars prosecution of this suit for lack of an indispensable party. The duties of the Comptroller of the Currency under the National Bank Act and the fact that the liquidation of the bank has been concluded leave no doubt that the Comptroller alone would have to respond to a judgment, if entered, and that a decree for the appellant could not expend itself on Connolly as receiver. Connolly had no custody or control of the funds which are the source of the dividend distributions, nor are the records here sought under his control. It is the Comptroller who has the entire duty and obligation under the National Bank Act to administer the affairs of the insolvent bank and to distribute dividends.

Before the receivership is closed, the receiver can respond to suits in which claims of depositors or creditors are sought to be established. But when, as here, the receivership has been closed, only the Comptroller's records, not the bank's, contain the information necessary to make up the reports which the appellant here seeks to require. At this stage, the Comptroller of the Currency is the only responsible official, and his absence from this cause is a fatal defect.

C. Both the Comptroller and the receiver who acts under his direction are officers and agents of the United States and their possession is possession

of the United States. Since this suit is directed to the action of government agents in their official capacities, it is one against the United States which can not be maintained without Congressional consent.

Congress has consented to suits on claims against the bank. But this is not such a suit. It is, rather, an action which seeks to subject federal agents to report requirements, penalties and investigations under state laws. The National Bank Act embodies no consent to such an action.

D. Prior efforts by Michigan Attorneys General to obtain declarations of applicability of the state escheat laws to this national bank in liquidation have been rebuffed by the court below. The parties here are successors in interest of the parties in those cases, and the declaration here sought is the same as was there denied. Consequently, those rulings may be *res judicata* here, "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell* v. *County of Sac.*, 94 U.S. 351, 352.

E. The constitutional question here sought to be raised by the appellant is not one to be lightly answered. There are many situations in which agencies of the United States occupy positions with respect to private individuals which might render

them subject to state escheat laws. All constitutional questions are intrinsically grave; and the problem here raised is larger than this particular liquidated bank or this particular state law. Under these circumstances, the principle of avoiding decision of constitutional questions whenever possible must be borne uppermost in mind.

The Michigan law whose validity this Court is asked to decide has not been authoritatively construed by the Michigan courts. There is room for serious doubt as to whether the Michigan legislature intended to apply its escheat law to a situation like that at bar. A constitutional decision at this juncture may, therefore, be little more than an "academic and needless dissertation." *A. F. of L.* v. *Watson*, 327 U.S. 582, 596. It follows that the appropriate course in this case would be to remand it to the district court with directions to retain the cause "until a definite determination of the local law questions could be made by the state courts." *Id.* at p. 599.

II.

The application of the Michigan discovery and escheat laws to this liquidated national bank and to the Comptroller of the Currency and his agents charged with responsibility for the liquidation, is constitutionally objectionable on two counts.

A. The National Bank Act has long been recognized by this Court as providing a complete system

for the winding up of insolvent banks and distribution of their assets. The asserted application of the Michigan escheat law is an attempt at substituting Michigan's distributive machinery for the Federal Government's. The Comptroller of the Currency has not in the past, and does not now, resist claims by states as successors in interest to deceased depositors. The provisions of state law of which the Government complains are not the state statutes of descent; they are, rather, the escheat laws which establish a state custodial and distributive system. That system and the federal distributive machinery cannot engage in parallel operations; one must displace the other. Congress, in the National Bank Act, has directed the Comptroller of the Currency to distribute those moneys paid over to him by receivers of national banks. That mandate cannot be put aside by the fiat of state law.

B. In any event, whatever may be the right of the state to the funds in dispute, the discovery, report, and penalty provisions of the state law cannot validly be applied to federal officers performing federal functions. And since the application of these provisions are primarily sought by the appellant in its petition, this constitutional objection stands in the way of the prosecution of this suit.

A state cannot interfere with the power of the United States to carry out the operations of Government pursuant to Congressional direction. "The United States may perform its functions without

conforming to the police regulations of a State." *Arizona* v. *California*, 283 U.S. 423, 451. State taxes can have no valid application to federal property and functions. Where, as here, "the governmental action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues." *Mayo* v. *United States*, 319 U.S. 441, 445, 448. In the absence of a Congressional direction to submit to report, penalty and visitorial provisions of state law, those provisions cannot be constitutionally applied against federal officials.

ARGUMENT.

I.

This Court Should Not Decide the Question of the Validity of the Michigan Discovery and Escheat Statute as Applied to Funds of a Liquidated National Bank in the Hands of the Comptroller of the Currency of the United States.

This Court's postponement of the question of its jurisdiction and of the motion to dismiss or affirm the appeal until the hearing on the merits (R. 76-77) raises, initially, the question whether an appeal properly lies in the instant case. We submit that the decision of a court of appeals that a state statute of general application does not apply to the Federal Government is not appealable and that, for this reason, the appeal should be dismissed. Various other grounds also exist for dismissing the

appeal or affirming the judgment below without deciding whether the Michigan statute may constitutionally be applied to federal officials carrying out their duties under federal statutes. Consequently, the first point in our brief is devoted to setting out the reasons for not deciding the constitutional question here pressed by the appellants.

A. *An appeal does not lie from the decision below.*—Beyond the intrinsic importance to this Court as a federal Supreme Court of any question as to the scope of its obligatory appellate jurisdiction, the jurisdictional issue whether this Court is obliged to review the judgment below is obviously one of consequence to the parties to this cause. The concern of the parties with the question whether an appeal lies is not minimized by the pendency of the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit in this case. No. 21, this Term. This is so because the situation here seems to be plainly one in which discretionary review should be withheld, so that the question of appeal becomes a question of review *vel non*.

This case revolves about a Michigan statute which has been repealed. Act No. 329, Public Laws of Michigan for 1947 (p. 591), Mich. Stats. Ann., Sec. 26.1053(65). This repealer does not terminate this particular litigation because a "pending suit or proceeding" is saved. But even if the Michigan Attorney General were to secure the declaration of applicability of the old escheat law which he seeks,

there is real question whether that declaration would have any appreciable practical effect. For there is certainly a serious question as to whether an actual escheat could be accomplished without the institution of a new suit in a Michigan circuit court in chancery under Section 9(b) of the old Michigan escheat law or in a state probate court under Section 10 of that law. See Appellant's Br. 16-17. Such a new suit could not, however, be brought, since the statute authorizing it has been repealed.

There can be no assurance that a decision of this Court as to the validity of the old law would be controlling on a suit brought under the new Michigan code of escheats. Cf. Appellant's Br. 29-30. The language and structure of the new Michigan code raises grave doubts as to whether that enactment was ever intended to be applied to national banks being liquidated under the direction and supervision of the Comptroller of the Currency of the United States. While Section 5 of the escheat code (Mich. Stats. Ann., sec. 26.1053(5) includes in its definition of a "holder" of "abandoned property," "a bank, either state or national," "a receiver or other liquidating officer," and "a governmental department, institution or agency," other provisions give one serious pause as to whether the Michigan legislature intended to apply its escheat laws to the Comptroller of the Currency or his agents in a situation like that at bar. Thus, for example, a purpose to reach an officer of a federal

court is accomplished by an explicit statement that an "officer of a court in this state" includes an officer of the "federal courts." Section 11. Specific provision is made for "governmental agencies of the state" in order that they be deemed "a holder" "of unprotected or abandoned property." Section 21. But no such general provision is made for federal "governmental agencies."

The problems of construction thus raised by the new code are new problems; as will be seen, they are different from the problems of construction raised by the old law. See *infra*, pp. 44-47. Moreover, the establishment of the Federal Deposit Insurance Corporation since the insolvency of the national bank here involved, the requirement that that Corporation be the receiver of a national bank, the provision for subrogation of the Corporation to claims of depositors, and the specific treatment prescribed with respect to the rights of depositors who fail to claim insured deposits, underlines the fact that this case may possibly be of financial interest to the parties, of perhaps historical and academic interest to the bar, but of plainly insufficient importance for the future. 12 U.S.C. 264(a), (l) (3), (l) (7), (m) (5). And so, unless 28 U.S.C. 1254 (2) leaves this Court with no alternative, intervention into this dying, if not dead, controversy would be plainly inappropriate.

That 28 U.S.C. 1254 (2) does not require review of this cause is a proposition we shall now proceed

to demonstrate. A right to appeal is there conferred on "a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States." Appendix A, *infra*, p. 60. But the obligatory appellate jurisdiction of this Court has been held restricted to a narrow class of cases, and the right of appeal has been denied whenever the prescribed conditions have not been rigorously fulfilled. *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649, 651; *Phillips* v. *United States*, 312 U.S. 246, 250. This rule has resulted in the denial of an appeal under predecessor provisions of 28 U.S.C. 1254(2),[2] where the application of a state statute to a particular situation, as distinguished from the statute itself, has been held unconstitutional by a court of appeals. *Reeves* v. *Williamson*, 317 U.S. 593; *Gamble* v. *Daniel*, 281 U.S. 705. In the instant case, the Michigan escheat law was held inapplicable to a liquidated national bank, but the constitutionality of the law itself was not in issue. Thus the decision falls squarely within the area in which appeal jurisdiction is denied.

The main prayer of appellant's petition was for a declaration that the Michigan escheat act, as

[2] The Reviser's Notes with respect to 28 U.S.C. 1254 state that the "effect of subsections (1) and (3) of the revised section [covering certiorari and certification] is to preserve existing law and retain the power of unrestricted review of cases certified or brought upon certiorari. *Only in subsection (2) is review restricted*". [Italics supplied.] See West Pub. Co. ed., p. 1824.

amended, "is applicable to the First National Bank—Detroit, a national banking association, heretofore declared insolvent and since such insolvency liquidated" (R. 14). Appellees' motion to dismiss did not urge the invalidity of the Michigan law (R. 48-49). Appellee's position in both courts has been (1) that the state statute does not apply because the National Bank Act provides a complete and exclusive system for the winding up of the affairs of an insolvent national bank, and (2) that no cause of action was stated because, pursuant to the federal statute, all funds realized from the liquidation of the insolvent national bank were paid over to the Comptroller of the Currency for distribution, and the Comptroller was not before the court.[3] In sustaining the dismissal of the petition, the court of appeals held that "the pres-

[3] Contrast the position taken by the R.F.C. in *R.F.C.* v. *Beaver County*, 328 U.S. 204, upon which the appellant relies (Br. 28). The appellant there said that "the Pennsylvania Statutes, to the extent that they impose a tax on machinery and equipment owned by the Defense Plant Corporation are violative of the Constitution and Statutes of the United States." No. 40, October Term, 1945, R. 4. See also R. 5 in that record.

While the phraseology of the pleadings will not themselves determine whether an appeal will lie (see appellant's brief, p. 28) if the opinion of the court plainly shows that the validity of the statute was passed upon (*Charleston Ass'n* v. *Alderson*, 324 U.S. 182, 185-186), the pleadings are highly relevant aids to a determination of the question decided by the court. Here, the court of appeals did not pass on validity, its decision constituting a resolution of the issues as framed by the parties. See *infra*, pp. 26-28.

ent action brought by the State of Michigan to apply its laws of escheat in the circumstances related constitutes an unlawful interference with the liquidation of a national bank" (R. 68), and not that the escheat laws themselves are unconstitutional.[4] The statute, therefore, has not been held "to be invalid as repugnant to the Constitution" (28 U.S.C. 1254(2)), and no appeal lies.

In *Reeves* v. *Williamson*, *supra*, this Court dismissed for want of jurisdiction an appeal from a decision of the court of appeals which held that a tax imposed under a Kentucky statute upon funds deposited in a United States postal savings depositary could not be collected because it "substantially burdens an instrumentality of the federal government." *Re Kentucky Fuel Gas Co.*, 127 F. 2d 657 (C.A. 6). In *Gamble* v. *Daniel*, *supra*, jurisdiction by appeal was held lacking where the court of appeals upheld an order directing a state liquidating agent acting under Nebraska statutes to turn over the books, accounts, and records of a trust company adjudicated a bankrupt to a receiver in bankruptcy. In overruling the claim that Nebraska's statute applied, the court of appeals held

[4] This distinction has heretofore been deemed crucial. Robertson & Kirkham, *Jurisdiction of the Supreme Court*, pp. 2[illegible]-24. Although this discussion deals with state courts, the same rules govern with respect to appeals from federal courts of appeal. See *id* at pp. 191-192. See also Boskey, *Appeals from State Courts under the Federal Judicial Code*, (1943) 30 Va. L. Rev. 57, 64, and cases cited in note 22.

that "there can be no question of the precedence of the Bankruptcy Act nor of the duty of the federal courts to sustain that act and the jurisdiction, rights, and duties thereunder." *Gamble* v. *Daniel*, 39 F. 2d 447 (C.A. 8). Similarly, the validity of a state statute will not be considered "drawn in question" for purposes of an appeal under 28 U.S.C. 1257(2) where the method of applying the statute rather than the statute itself is attacked. *Charleston Ass'n* v. *Alderson*, 324 U.S. 182, citing *Reeves* v. *Williamson*, *supra*, at 324 U.S. at 185; *Memphis Natural Gas Co.* v. *Beeler*, *supra*; *Baltimore National Bank* v. *State Tax Commission*, 296 U.S. 538 (from *State Tax Comm.* v. *Balt. Nat. Bk.*, 169 Md. 65, 180 A. 260).

These decisions are controlling in the case at bar. The cases cited by appellant are not in point since they related to the power of the State to enact the statute in question and resulted in its invalidation. Certainly, the opinion of the court below is the best evidence of the scope of its decision. Bearing in mind that the opinion in this case rests on the court's previous adjudications,[5] its description of what it had previously held is of the greatest significance (R. 67):

> In *Rushton, Att'y. Gen* v. *Schram* * * * we held that the amendatory act did not ap-

[5] *Starr* v. *O'Connor*, 118 F. 2d 548, certiorari denied *sub nom. Starr* v. *Schram*, 314 U.S. 695; *Rushton* v. *Schram*, 143 F. 2d 554; *Starr* v. *Schram*, 143 F. 2d 561.

> ply *retroactively* to dormant deposits in the insolvent First National Bank—Detroit. * * *
>
> We expressed the further presumption that the Michigan legislature had not designed to nullify the decision of this court in the *Starr* case, but had enacted a law intended to operate *prospectively* only. * * * One of our judges, however, based concurrence in the result reached upon the proposition that the Michigan amendatory act operated in the context as an unlawful interference with the liquidation of a national bank as provided for in Title 12, Section 194, of the United States Code. The majority opinion did not gainsay this, but attributed to the Michigan legislature no intended interference with the liquidation of the First National Bank—Detroit.

Despite this explicit statement of the difference between the majority view and that of Judge Simons, concurring, and the absence of any statement that the majority now chose to rest its decision on the broader grounds,[6] the appellant suggests that the majority came around to Judge Simons' way of thinking in *Starr* v. *Schram,* 143 F./2d 561, 562. Br. 23. But that is hardly likely, since that decision was handed down at the same time as the decision in *Rushton* v. *Schram,* in which

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[6] In the light of what has been previously said, it is not believed that adoption of Judge Simons' view by the majority of the court would, in any event, sustain the appeal to this Court.

the differing views of the majority and the concurring judge required separate statement.

The determination by the court of appeals of the applicability of the state law presents no question which gives this Court jurisdiction of the appeal. *Pub. Serv. Comm.* v. *Batesville Tel. Co.*, 284 U.S. 6; *Baxter* v. *Continental Casualty Co.*, 284 U.S. 578. Even when a particular construction is put upon a statute in order "to avoid embarrassing and doubtful questions of constitutional power," such a ruling leaves "the validity of the statute * * * untouched" and an appeal will not lie. *Hopkins Savings Assn.* v. *Cleary*, 296 U.S. 315, 332, and note 4.

B. *The Comptroller of the Currency is an indispensable party to this action.*—The Comptroller of the Currency is an indispensable party to this action since a "decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him." *Williams* v. *Fanning*, 332 U.S. 490, 493. The prayer for relief in appellant's petition, considered in the context of the requirements of the Michigan statute, the duties of the Comptroller of the Currency under the National Bank Act, and the status of the liquidation leaves no doubt that action by the Comptroller or by a subordinate pursuant to his direction is called for and that a decree entered in favor of appellant could not expend itself on Connolly as receiver.

The petition seeks a decree declaring the Michigan discovery and escheat laws applicable to the liquidated national bank and declaring the receiver subject to the provisions of these laws (R. 14). The Michigan law defines a "depositary" as any person "who or which has in his or its possession or under its control any property, real, personal or mixed, including liquidated choses in action, for which he or it is indebted or accountable to any other person as depositor" (R. 17). Depositaries are required to file reports with respect to dormant deposits with the state board of escheats and to subject their books and records to examination by the state board of escheats or the Attorney General (R. 18-20). Penalties are provided for failure to comply with the reporting requirements and several procedures are authorized for escheating to the state moneys or credits owed with respect to which there have been no transactions or dealings for seven years (R. 20-23). The petition makes clear that its purpose is to have these various provisions declared applicable so that funds held against returned and unclaimed dividend checks, checks which were not deliverable, and checks not presented for payment, could be taken into the custody of state officers and eventually escheated to the State of Michigan (R. 3-15).

It is impossible to read the pertinent provisions of the National Bank Act so as to permit the Michigan laws to operate on Connolly as receiver rather than on the Comptroller of the Cur-

rency. As will be seen, the receiver is not now and never was a depositary under the Michigan laws since he was never "indebted or accountable" to any person except the Comptroller. He is not in possession of, and has no control over, the funds which the state wishes to reach. And he does not have the books or records necessary for filing the statutory reports or for submission to examination by state officials.[7] All of these are in the possession and control of the Comptroller of the Currency.

Under the provisions of the National Bank Act applicable herein, all duties of the bank receiver are performed under the direction and control of the Comptroller, and he must make report of all his acts and proceedings to the Comptroller. 12 U.S.C. 192. The receiver's duties go only to the liquidation of the bank assets, under the direction and control of the Comptroller. The receiver is required to pay over all moneys realized from the bank's assets to the Treasurer of the United States, subject to the order of the Comptroller. 12 U.S.C. 192. All distributions are the function of the Comptroller alone and not the receiver. The statute provides that "the comptroller shall make a ratable dividend of money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of com-

[7] It is not suggested that the unavailability of the books and records to Connolly, because of their transmission to Washington, stands in the way of appellant's suit. See stipulation, R. 38-40. Connolly's inability to produce would be the same had the records remained in Detroit. See *infra*, pp. 32-33.

petent jurisdiction" (12 U.S.C. 194). Congress has thus placed on the Comptroller the entire responsibility for the winding up of the affairs of an insolvent national bank. As stated in *Ex parte Chetwood*, 165 U.S. 443, 458, "The receiver acts under the control of the Comptroller of the Currency and the moneys collected by him are paid over to the Comptroller, who disburses them to the creditors of the insolvent bank." See also *United States* v. *Weitzel*, 246 U.S. 533, 540. Moreover, there is no authority in the courts to prevent the receiver from carrying out his statutory duty to pay over to the Treasurer of the United States, subject to the order of the Comptroller of the Currency, all moneys realized by him from liquidation of the bank's assets. *Earle* v. *Conway*, 178 U.S. 456; *Earle* v. *Pennsylvania*, 178 U.S. 449, 454-455, 456.

Since the Comptroller has the sole statutory responsibility for the dividend distribution, he has control of the funds. He has the records covering the distribution to date. Any report made must come from him to be complete. Any funds appellant seeks to take over must come from accounts in his name. He is the instrumentality appellant seeks to supplant. The opposing interests in the case at bar are the Comptroller's and the appellant's. No interest or duty of the receiver is threatened.

The possession and control of the Comptroller are practical realities in the instant case as well

as statutory responsibilities. Long prior to the demand involved herein and the institution of this action, all the normal functions of the bank receivers, as well as the additional delegated authority, had been terminated. The receiver had completely performed his statutory duties and had divested himself of all funds as of December 11, 1944. Appellee was in fact an employee of the Comptroller who was receiver in name only to assist in clearing titles and similar incidental matters. The Comptroller drew every dividend check described in the demand for a report as well as every valid dividend check undelivered or outstanding when this suit was filed (R. 51,52). The undelivered dividend checks were all drawn by and are in the possession of the Comptroller. All valid outstanding and unpaid dividend checks are admittedly drawn against funds deposited to the credit of the Comptroller and subject to his control.

Appellant's suggestion that the records relevant to this action are required by 12 U.S.C. 192 to be retained by the receiver (Brief for appellant, p. 51) clearly misconceives the effect of that section because of his confusion of the three sets of books and records involved in the liquidation of an insolvent national bank. These include (1) the books and records of the bank, containing entries to date of suspension only, which are destroyed as no longer useful when the receivership is closed; (2) the receiver's records of the assets that passed into

his hands and his accounting for the proceeds thereof to the Comptroller; and (3) the only records involved here, the books of the United States in which the Comptroller records the moneys paid him by the receiver under 12 U.S.C. 192 and all the Comptroller's dividend transactions pursuant to 12 U.S.C. 194. Neither the records of the bank nor the receiver could contain the information required for the reports contemplated by this action. Only the Comptroller's records would supply the necessary information.

In summary, appellee had in fact no custody or control of the funds from which dividend distribution was and is being made, nor any control over the distribution. The records concerning dividend distribution are the Comptroller's records and the funds are the Comptroller's funds, since the Comptroller has the entire duty and obligation under the National Bank Act to administer the affairs of insolvent banks and to make and distribute the dividends. The decree sought would require action of the Comptroller of the Currency—a report as to matters entrusted to him by federal statute and in his control only, for use in connection with an asserted right to the seizure of money in the Comptroller's custody and control. Thus, the action invades the Comptroller's interests and duties, and it is upon him that the decree sought would operate.

In federal declaratory judgment actions the question is whether the facts alleged show a sub-

stantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Maryland Casualty Company* v. *Pacific Coal & Oil Company*, 312 U.S. 270; *Aetna Life Insurance Company* v. *Haworth*, 300 U.S. 227, 239. Here there is no "immediacy and reality" to the controversy between the appellant and this appellee. The Comptroller, the only party who has possession of the checks and records necessary to the preparation of the report demanded and of the money sought, whose rights, duties and interests are being threatened with infringement, and whose action would be required by any judgment is not in the case. Under the recent decision of this Court in *Williams* v. *Fanning, supra*, the Comptroller is an indispensable party in these circumstances to the granting of the relief appellant seeks. See *Webster* v. *Fall*, 266 U.S. 507; *Gnerich* v. *Rutter*, 265 U.S. 388; *Warner Valley Stock Co.* v. *Smith*, 165 U.S. 28; cf. *Miguel* v. *McCarl*, 291 U.S. 442, 455.

In support of his contention that he may proceed against appellee, as receiver, alone, appellant's brief (p. 48) cites several decisions of this Court sustaining suits against receivers alone with respect to claims against national banks. These cases are distinguishable in that they all deal with the establishment of claims of depositors or creditors of the bank which were brought before the

close of the receivership.[8] Those are merely the normal type of litigation in which every national bank receivership has found itself involved—that covered by the language of the National Bank Act concerning claims "adjudicated in a court of competent jurisdiction." But when suit is brought to *collect* a dividend rather than to *adjudicate or establish* a claim, the Comptroller of the Currency is the appropriate party defendant. *White* v. *Knox*, 111 U.S. 784. This basic distinction also explains why the Comptroller was an unnecessary party in *Starr* v. *O'Connor*, 118 F. 2d 548, which involved the assertion of claims by the state in this receivership when it was open and when all the relief sought was within the framework of adjudication of claims. The different situation that prevails when suits of a different character are involved is illustrated by *Merrill* v. *National Bank of Jacksonville*, 75 Fed. 148 (C.A. 5), affirmed, 173 U.S. 131. In addition to the adjudication of or-

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[8] This is established by comparing the dates of the closing of the receiverships, set out in the Comptroller's annual reports to Congress, with the dates of the decisions relied on by the appellant.

Case	*Citation*	*Date Decided*	*Date of Closing of Receivership Involved*	*Date and Page No. of Compt's Annual Report*
Case v. *Bank*	100 U.S. 446	Oct. T., 1879	June 1, 1881	Dec. 5, 1881—p. 154*
Armstrong v. *Am. Exch. Nat. Bank*	133 U.S. 433	Mar. 3, 1890	Oct. 30, 1909	Dec. 6, 1909—pp. 328, 345
Earle v. *Conway*	178 U.S. 456	May 14, 1900	Sept. 30, 1916	Dec. 4, 1916—p. 136
Merrill v. *Nat. Bank of Jacksonville*	173 U.S. 131	Feb. 20, 1899	Oct. 1, 1900	Dec. 3, 1900—pp. 480, 493
Am. Surety Co. v. *Bethlehem Nat. Bank*	314 U.S. 314	Dec. 8, 1941	Aug. 20, 1943	Jan. 10, 1944—pp. 70, 75

* Report of Dec. 6, 1880, p. 136 shows receivership open and total dividends paid 80%, Report of Dec. 5, 1881, shows receivership closed and total dividends paid 84.83%

dinary claims, the lower court also ordered the receiver to file an accounting as to the bank assets, the collections he had made and the expenses incurred in administering the receivership. In reversing the lower court as to this, the court of appeals said (p. 153):

> The appellee had a right to resort to the court to have his claim adjudicated when it was refused by the comptroller, but it is very doubtful whether, on the case made by the bill and answer, if in any case, the receiver, in a suit in which the comptroller is not a party, can be made to account for an administration of which the comptroller is solely responsible.

The attempt to obtain the reports in the instant case would seem to present a comparable case.

C. *This is a suit against the United States to which it has not consented.*—The thrust of the present action, as has just been shown, is toward the duties conferred upon the Comptroller of the Currency by federal statute in his official capacity in connection with the liquidation of insolvent national banks. The status of the Comptroller as a federal official cannot be questioned. 12 U.S.C. 1, 2. Similarly, the receiver appointed to perform his duties "under the direction of the comptroller" (12 U.S.C. 192) is also an agent of the United States. See *Auten* v. *United States National Bank of New York*, 174 U.S. 125, 141; *Roth* v. *Hood*, 106 F. 2d 516, 617 (C.A. 6); *Granzow* v. *Village of Lyons, Ill.*, 89 F. 2d 83, 85

(C.A. 7); *Steele* v. *Randall*, 19 F. 2d 40, 42 (C.A. 8). And "the possession of the receiver appointed by the Comptroller * * * is the possession of the United States." *Port Newark National Bank* v. *Waldron*, 46 F. 2d 296, 298 (C.A. 3); cf. *Chemical National Bank* v. *Armstrong*, 59 Fed. 372, 375 (C.A. 6), affirmed, 176 U.S. 618. The United States clearly has an interest in, and a duty with respect to, the funds realized in liquidation. *O'Connor* v. *Rhodes*, 79 F. 2d 146, 151 (C.A.D.C.); *Richmond, F. & P. R. Co.* v. *McCarl*, 62 F. 2d 203 (C.A.D.C.), certiorari denied, 288 U.S. 615; cf. *Haskins Bros. & Co.* v. *Morgenthau*, 85 F. 2d 667 (C. A. D. C.), certiorari denied, 299 U.S. 588. Since the suit is directed to the action of government agents in their official capacities, it is clearly a suit against the United States which cannot be maintained without the Government's consent. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 688, and dissenting opinion, pp. 711-712; *Maricopa County* v. *Valley National Bank*, 318 U.S. 357. Nor does the fact that a state may be the party plaintiff create any exception to the rule of immunity of the United States against suit without its consent. *United States* v. *Alabama*, 313 U.S. 274; *Minnesota* v. *United States*, 305 U.S. 382, 387.

The consent of the United States has not been expressly given and cannot be implied from the statutory provisions relating to the administration of insolvent national banks. The Comptroller

is required to cause notice to be given "calling on all persons who have claims against such association to present the same, and to make legal proof thereof" (12 U.S.C. 193). He is also directed to make a ratable distribution of funds "on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction" (12 U.S.C. 194). Provision has thus been made for suits to establish the claim of creditors of the insolvent bank. But appellant here was not a depositor in, or creditor of, the bank and is not seeking to adjudicate a claim against the insolvent bank. This is an action which seeks to subject federal agents to report requirements, penalties, and investigations under state laws. And the National Bank Act embodies no consent to such an action.

Since a depositor or creditor could not bring this suit, no claim against the insolvent bank being asserted within the meaning of the National Bank Act, a successor in interest cannot. Moreover, the appellant is not here suing as the successor in interest of a depositor or creditor for, as the Supreme Court of Michigan recently held: "The term escheat is distinct from succession to heirs and next of kin. [Escheat] 'is rather a right to confiscate property to which there is no other claimant.'" *In re Rapoport's Estate*, 317 Mich. 291, 301, 312, certiorari denied *sub nom. California* v. *Michigan State Board of Escheats*, 332 U.S. 764.

D. *A prior adjudication in a suit between the predecessors of the parties to this action may op-*

erate as a bar here.—The prior decisions of the Court of Appeals for the Sixth Circuit may be *res judicata* as to the instant action. *Starr* v. *O'Connor*, 118 F. 2d 548, certiorari denied *sub nom. Starr* v. *Schram*, 314 U.S. 695; *Rushton* v. *Schram*, 143 F. 2d 554; *Starr* v. *Schram*, 143 F. 2d 561. The parties in those cases are privies of the parties here. The issues in all the actions are virtually the same. The same statute is involved in the instant case as in the two latter cases. In all the cases, the question was the applicability of the Michigan escheat laws to the liquidation of the First National Bank—Detroit, a national banking association. As the court of appeals said, the "present battle is fought upon essentially the same legal grounds upon which former contests have been waged" (R. 68).

In *Starr* v. *Schram*, *supra*, the court upheld a district court decree to the effect that the Michigan escheat statutes "constitute an unlawful interference with the liquidation of an insolvent national bank, and are inapplicable to the receivership in the instant case" (p. 562). In the instant case, the petition prayed for a judgment declaring the very same laws "applicable to the First National Bank—Detroit, a national banking association, heretofore declared insolvent and since such insolvency liquidated" (R. 14). The court below affirmed the dismissal of the petition on the ground that "The present action brought by the State of Michigan to apply its laws of escheat in the circumstanees related constitutes an unlawful interference with the liqui-

dation of a national bank upon the same principles and authority fully discussed in our previous opinions" (R. 68). The identity of parties and issues is apparent. In these circumstances, it may be that the instant case can be disposed of on grounds of *res judicata*.. See *Fishgold* v. *Sullivan Corp.*, 328 U.S. 275, 282; Black, *The Law of Judgments* (2d ed.), pp. 764, 821, 936.

Even if a distinction be perceived between the cases brought under the same statute in that its applicability in the earlier case related to dormant deposits whereas the present case is directed to dormant dividend distributions, the doctrine of *res judicata* may nevertheless be applicable because this question could have been presented at the same time. A prior judgment "is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell* v. *County of Sac*, 94 U.S. 351, 352. See also *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 415; *Grubb* v. *Public Utilities Commission*, 281 U.S. 470, 479; *Stoll* v. *Gottlieb*, 305 U.S. 165; *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 375, 378.

E. *The constitutional issue should not be decided in the absence of an authoritative state court determination of the question of state law.*—From its very beginning, this Court has announced and ap-

plied the rule that it will not decide a "constitutional question in advance of the necessity for its decision." *Federation of Labor* v. *McAdory*, 325 U.S. 450, 461, and cases cited; Mr. Justice Brandeis concurring, in *Ashwander* v. *Valley Authority*, 297 U.S. 288, 346-348. One aspect of that rule is that, whenever possible, a statute should be construed to avoid, rather than to present, a constitutional question. *United States* v. *C. I. O.*, 335 U.S. 106; *United States* v. *Delaware & Hudson Co.*, 213 U.S. 366, 407-408; *Knights Templars Indemnity Co.* v. *Jarman*, 187 U.S. 197, 205; *Harriman* v. *I. C. C.*, 211 U.S. 407; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298, 307; *Missouri P. R. Co.* v. *Boone*, 270 U.S. 466, 471-472; cf. *Blodgett* v. *Holden*, 275 U.S. 142, 147.

This doctrine of avoidance has special pertinence here. The problem presented by this case is much larger than whether the Comptroller of the Currency, as the liquidator of insolvent national banks, must submit to regulation by the State of Michigan. The situations are legion in which agencies of the United States occupy positions with respect to private individuals which would render them depositaries under the Michigan law. There are many situations in which the Government may be in the position of holding funds which are owed to, or are the property of, claimants whose whereabouts are unknown and who have not been heard from for long periods of time. To suggest but a few, this might be true of holders of savings and other gov-

ernment bonds, depositors in postal savings accounts, unpaid postal money orders, members of the military or civil service of the United States with unclaimed wages or other claims, beneficiaries of servicemen's insurance policies, and the host of situations in which some agency of the United States may become the custodian of property belonging to others. For some indication of the scope of these situations, see Permanent Appropriation Repeal Act of June 26, 1934, 48 Stat. 1224, 1230, Section 17. There may also be many claims against the United States based upon the variety of business transactions in which the Government engages with private individuals in carrying out its government functions. Moreover, questions involved in the escheat of "abandoned" personal property are not confined to the Michigan statute. As recently observed, "escheat of these interests is a newly exploited, if not newly discovered source of state revenue." *Connecticut Ins. Co.* v. *Moore*, 333 U.S. 541, dissenting opinion, p. 563.

The court below was fully cognizant of the influence of these factors on the problem of construing the Michigan law. In *Rushton* v. *Schram*, 143 F. 2d 554, upon which it relied heavily for its decision in this case (R. 67-68), the court said (143 F. 2d at 558, 559):

> It should not be implied that the Michigan legislature intended to promulgate a retroactive law, which would interfere with the complete system provided by Congress for winding up national banks * * *.

> Surely the legislature took cognizance of the principle that national banks are immune from such state control as would conflict with the laws of the United States. * * *
> * * * * * * * * *
> If an interpretation of a state statute can be reasonably adopted which does not bring the enactment within the inhibition of federal law, that interpretation should prevail against another which would rest upon an assumption that the state legislature intended to enact a law in conflict with the constitution or statutes of the United States.

If, as we have already suggested (*supra*, pp. 22-28), the court below, in this case, held the Michigan escheat laws inapplicable to this liquidated national bank, its decision is not an appealable one under 28 U.S.C. 1254(2). Consequently, this Court can reach further questions on this appeal only after it determines that the court below has held the statute applicable but invalid.

But even assuming that the opinion below can be so read, the Government believes that this Court should, nevertheless, not decide the constitutional question presented. As "questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law." *Spector Motor Co.* v. *McLaughlin*, 323 U.S. 101, 105, and cases cited. In this case, the Michigan courts "have the final say as to" the meaning of the Michigan

escheat law. "When authoritatively construed, it may or may not have the meaning or force which [appellant now assumes] that it has. In absence of an authoritative interpretation, it is impossible to know with certainty what constitutional issues will finally emerge. What would now be written on the constitutional questions might therefore turn out to be an academic and needless dissertation." *A. F. of L.* v. *Watson*, 327 U.S. 582, 596. That a court of appeals of a circuit embracing the state whose law is in question has decided that question of state law is not sufficient basis for a decision on a question of constitutionality by this Court. *Spector Motor Co.* v. *McLaughlin*, 323 U.S. 101, 102, 103; cf. *Propper* v. *Clark*, 337 U.S. 472, 489-492. And judicial abstention is particularly appropriate when, as here, the suit is for a declaratory judgment—a "procedure [which] may be resorted to only in the sound discretion of the Court and where the interests of justice will be advanced and an adequate and effective judgment may be rendered." *Federation of Labor* v. *McAdory*, 325 U.S. 450, 462, and cases cited.

The interpretation put on the Michigan law by the court below in *Rushton* v. *Schram*, 143 F. 2d 554, is but one source of doubt as to whether the Michigan law would reach the national bank liquidation here involved.[9] The text of the act gives

[9] On October 9, 1912, Michigan Attorney General Roger I. Wykes wrote an opinion to the Commissioner of the State Banking Department. The Attorney General concluded as

rise to further questions requiring authoritative decision. The reach of the Michigan discovery and escheat statute is limited by its definition of the words "person" or "persons" to include "a natural person, a copartnership, a company, an association, a bank, a trust company, a corporation, *except municipal corporations, or any officer thereof, any governmental department, agency, instrumentality or official,* a depositary, a receiver, a trustee, a fiduciary, a debtor, a custodian, a liquidating officer, or any combination of natural person." Section 13458-2 [appearing as 13458-3 at R. 17], Sec. 4b (italics supplied). The depositaries subject to the reporting and other provisions of the Michigan statute are those which are embraced in the above definition of persons. *Ibid.*

Accordingly, if government officials are excluded from the definition of "persons" in the Michigan law, the question whether the statute can constitutionally be applied to funds in the possession of the Comptroller of the Currency does not arise.

It is apparent from a reading of the portions of the definition underscored above that the extent of the exception provided is not clear. The

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follows: "I am inclined to the opinion that the Michigan act relating to reports by banks of escheated deposits would if construed to apply to national banks be held to be in violation of the national banking act. I conclude, therefore, that the Michigan escheated estate act, so far as it relates to reports of escheated deposits by banks, should be construed as not applying to national banks." Ann. Rep't, Mich. Att'y Gen., 1913, pp. 134-135.

exclusionary provision may be read, for example, as embracing only "municipal corporations, or any officer thereof" or it may be deemed to include as well "any governmental department, agency, instrumentality or official." In view of the two disjunctive phrases and the return after "or official" to the article "a" used in the earlier part of the definition, the grammatical structure of the sentence does not dictate a termination of the excepting clause at one point or the other. The interpretation that government officials are excluded, however, is supported by other statutory language. The provisions for signing reports under the Act describe the authorized procedure for natural persons, partnerships, corporations, and others, but completely omit reference to reports by government agencies or officials. Section 13460 [appearing as 13460-1 at R. 18], Appendix, *infra*, p. 67. Since the Comptroller of the Currency under federal law is the statutory holder of the funds for distribution and the official who has the statutory obligation to distribute the liquidated assets to creditors, it is clear that the exception of government officials would render the Michigan statute inapplicable to him.

Other provisions of the Michigan act also indicate that it is not applicable here. It is stated to apply to "each person within this state, who or which as a depository is indebted or accountable to any other person for money, credits, securities or property of any kind." 13460 [appearing as 13460-1 at

R. 18], Sec. 6. Section 4b defines depository to include any person "who or which has in his or its possession or under its control any property * * * for which he or it is indebted or accountable to any other person as depositor." The Comptroller is not within Michigan, and the receiver is neither indebted nor accountable to anyone other than the Comptroller. 12 U.S.C. 192, 194.

It does not appear that either of these questions has been submitted to the Michigan courts.[9a] Since the necessity of deciding an important constitutional issue in the instant case depends on a genuinely doubtful question of state law, we submit that the proper course in this case would be to direct "the District Court to retain the bill until a definite determination of the local law questions could be made by the state courts." *A. F. of L.* v. *Watson*, 327 U.S. 582, 599, and cases cited *supra*, p. 44; *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478; cf. *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 U.S. 129. It need hardly be said that if this Court should itself decide to resolve the disputed questions of state law, an interpretation which will avoid the constitutional questions would

[9a] It is significant that the Michigan Supreme Court has said that "Even a casual review of the Michigan escheat law, and particularly the 1941 amendment, convinces that it is piecemeal legislation with many apparent inconsistencies. * * * We are compelled to construe Act No. 170 * * * in such manner as to avoid constitutional pitfalls, if this can be reasonably done within the legislative intent." *Evans Co.* v. *State Bd. of Escheats*, 307 Mich. 506, 548.

be consonant with the principles that have always guided this Court in the exercise of its most delicate functions. See *supra*, pp. 40-41.

II.

The Michigan Discovery and Escheat Law Cannot Validly Be Applied Against Federal Officers Charged with the Liquidation of a National Bank.

Two distinct constitutional obstacles stand in the way of appellant's efforts to apply the Michigan discovery and escheat laws to liquidated national banks. In the first place, to compel a transfer of custody to state officials is to intrude upon a function exclusively committed to the Comptroller of the Currency by the National Bank Act. Secondly, the discovery, report, and penalty provisions of the Michigan law would, if here applied, unconstitutionally subject federal officers, in the performance of their official duties, to state regulation.

A. *The Michigan escheat law cannot displace the distributive powers granted the Comptroller of the Currency by the National Bank Act.*—The question in this case is not whether the state's ownership of a claim against the receiver of a national bank or the Comptroller of the Currency will be respected by the federal officials charged with the liquidaton of a national bank. The question is, rather, whether the right to distribute unclaimed funds arising out of a national bank liquidation can be taken from the Comptroller of the Cur-

rency and exercised by the state purely by the fiat of state law. The distinction is basic.

When a state, by the operation of its laws of descent succeeds to a depositer's claim against an insolvent national bank, the Comptroller must and does honor that claim.[10] Cf. *United States* v. *Klein*, 303 U.S. 276, 280. The "escheat or appropriation by the state of property in fact abandoned or without an owner is * * * as old as the common law itself." *Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233, 251. But that is not such an escheat as the Government is here resisting.[11] The Michigan escheat law here sought to be applied is not a state statute of descent.[12] Here, "Dormancy without more is made the statutory ground for the state's taking" unclaimed deposits and dividend checks "into its custody." *Ibid.* See Section 13463-1, [appearing as 13463-2 at R. 22], 9a of the Michigan law. As has been noted, *supra*, p. 38, the Michigan Supreme Court has recently made it clear that "escheat is distinct from succession." *In re Rapoport's Estate*, 317 Mich. 291, 301, certiorari denied,

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[10] There is printed in Appendix B, *infra*, pp. 68-71, an exchange of correspondence culminating in payment, by the Comptroller, to a Michigan Public Administrator on the account of a deceased depositer.

[11] That even such an escheat cannot be accomplished by imposing the discovery, report and penalty provisions on liquidated national banks will be shown, *infra*, pp. 53-59.

[12] The "laws of descent" of the State of Michigan which vest an estate "in the state" are referred to in Section 13456 of the Michigan escheat law. See R. 16.

sub. nom. California v. *Michigan State Board of Escheats,* 332 U.S. 764. The state asserts, in the first instance, a conservatorial interest, not a beneficial one. *Evans* v. *State Bd. of Escheats,* 307 Mich. 506, 520; cf. Mich. Stats. Ann. (1947 Cum. Supp.) Sec. 26.1053(64). Thus, the Michigan law of escheat establishes, for Michigan, custodial machinery for the administration and distribution, in a case of this sort, of dormant deposits and claims.

But it has long been held that the National Bank Act provides a complete system for the winding up of insolvent national banks, including all steps for the distribution of their effects, which embraces the entire field, to the exclusion of other law. *Deitrick* v. *Greaney,* 309 U.S. 190, 195; *Cook County National Bank* v. *United States,* 107 U.S. 445, 448; *Davis* v. *Elmira Savings Bank,* 161 U.S. 275; *Easton* v. *State of Iowa,* 188 U.S. 220. Thus, for example, in *Cook County National Bank* v. *United States, supra,* at 448, the Court said:

> We consider that act as constituting by itself a complete system for the establishment and government of national banks * * *. Everything essential to the formation of the banks, the issue, security, and redemption of their notes, the winding up of the institutions, and the distribution of their effects, are fully provided for, as in a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates.

"The banking system which Congress thus established embodied a blend of governmental and private purposes." *Inland Waterways Corp.* v. *Young*, 309 U.S. 517, 522. National banks may be subject in their daily course of business to state laws relating to such matters as contracts, their acquisition and transfer of property, their right to collect debts, their right to be sued for debts, and the rights of succession to property. *Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233; *McClellan* v. *Chipman*, 164 U.S. 347, 356; *National Bank* v. *Commonwealth*, 9 Wall. 353, 362. But in the administration of banks in liquidation, even in cases which related solely to the property interests of private parties, it has been held that the "question for decision is * * *, one of federal law." *American Surety Co.* v. *Bethlehem Nat. Bank*, 314 U.S. 314, 316; *Deitrick* v. *Greaney*, 309 U.S. 190, 200-201.

The federal law (12 U.S.C. 194, Appendix A, *infra*, pp. 63-64) requires the Comptroller of the Currency, and not state agencies, to distribute money paid over to him by the receiver of an insolvent national bank; ratable dividends on proved or adjudicated claims are made mandatory, and the Comptroller is directed to pay over the remainder, if any, to the bank's shareholders. The Comptroller has in the past, and continues now, to make every effort to locate those who are entitled to receive dividends awarded on proved or adjudicated

claims. What the state here seeks to do is to forestall such federal efforts, to intrude itself into the distributive scheme established by the National Bank Act.

The state may believe that its "procedure actually expedites and facilitates the liquidation by handling unclaimed dividends which cannot otherwise be disposed of under the federal procedure." Br. for appellant, p. 40. But there is another view that "It is naive beyond even requirements of the judicial office to assume that this lately manifest concern of the states over abandoned insurance proceeds [for example] reflects only solicitude for the unknown claimants." *Connecticut Ins. Co.* v. *Moore*, 333 U.S. 541, 563 (dissenting opinion). The problem of choosing between systems of distribution is Congress's, certainly not the states'. And here, Congress has conferred the power and duty to make distribution on the Comptroller of the Currency, not the Michigan Board of Escheats. Whether, all efforts at distribution having failed and the state being unable to establish its right under its laws of descent, the remaining funds should go to Michigan or to the use of the Federal Government or elsewhere is a problem this Court need not and cannot face at this time. There has been, and can be, no showing that that is the existing situation; when there is, it will be time enough to consider what disposition the National Bank Act permits, if Congress has not, by that time, made the matter so clear as to leave no question.

Appellant's reliance (Br. 38-40) on *Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233, is sufficiently undermined by Judge Simons, concurring in *Rushton* v. *Schram*, 143 F. 2d 554, 561 (C.A. 6);

> It may very well be that the protective custody of the state reaches inactive bank accounts in solvent national banks. Such banks, though subject to federal regulations, are owned and operated by private corporations, and subject to state law. Where, however, custody has passed to the federal government in the exercise of constitutional and legal powers under federal law, I think the state is not empowered to interfere with it without the government's consent, clearly expressed in Congressional enactment. The distinction, it seems to me, is basic.

B. *Federal agencies cannot be subjected to regulation by the states in the performance of their official duties.*—Whether or not the Government is correct in its contention, just expounded, that the State of Michigan has no custodial right to the funds here in question, its attempt to impose on the Federal Government the discovery, report and penalty provisions of its laws (see Appendix A, *infra*, pp. 65-67, and R. 20-21, Sections 6a and 7) is independently blocked by constitutional barriers. For that reason alone, this suit must fail. To grant the declaratory judgment requested in the petition, that the Michigan escheat laws are applicable in the instant situation, is to de-

cide that officers of the United States are required to compile reports and file them with the State (R. 7-8, pars. X, XI; R. 10-12, pars. XVI-XVIII). These reports must, of necessity, be based upon books, records, and documents which are maintained in the performance of governmental functions, with respect to funds in the possession of the United States, pursuant to a federal statute regulating the liquidation of insolvent national banks. Such a judgment will also decide that the State may exercise powers of inquisition and visitation and impose penalties on the United States in the exercise of its governmental functions.[13] As previously pointed out (*supra*, pp. 41-42), such a determination may also subject a host of other federal instrumentalities like post offices, collectors of internal revenue, federal fiscal agents and others,

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[13] Compare the opinion of the Michigan Attorney General, rendered in 1912, that the Michigan legislature intended to confer no visitorial powers over national banks by enacting the Michigan escheat law. Ann. Rep't, Mich. Att'y Gen., 1913, pp. 134-135.

See also 12 U.S.C. 484, which provides: "No [national] bank shall be subject to any visitorial powers other than such as are authorized by law, or vested in the courts of justice or such as shall be or shall have been exercised or directed by Congress, or by either House thereof or by any committee of Congress or of either House duly authorized." This provision of federal law is to be contrasted with Section 6a of the Michigan law, providing in part that "The State Board of Escheats or the Attorney General shall have all the powers with respect to examination of the books and records of the depositories making such reports as are provided by the banking laws of this state with respect to examination of banks." (R. 20.)

to these requirements of Michigan law and the similar requirements of other states.

The very fact of federal regulation has led this Court to conclude, even when national banks are being operated by their private owners, "that it is not competent for state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government." *Easton* v. *State of Iowa*, 188 U.S. 220, 238. Certainly, then, when the processes of liquidation have been taken over by agencies of the Federal Government because of the bank's insolvency, the activities of federal officers performing their official functions are free from state regulatory action.

Judge Simons' concurring opinion, already referred to, 143 F. 2d 554, 561, considered the problem in its proper light when he wrote—

> I think, however, that the amended Act, at least insofar as it permits the state administrator to exercise powers of visitation and inquisition, and insofar as it imposes penalties upon an agency of the federal government in possession of the assets of an insolvent national bank, operates as an unlawful interference with the liquidation of a national bank provided for in § 194, 12 U.S.C.A., of the National Banking Act.

The majority of the court "did not gainsay this" (R. 67) and, in the instant case, held that the action "constitutes an unlawful interference with the

liquidation of a national bank upon the same principles and authority fully discussed in our previous opinions" (R. 68). This decision is well supported by the multitude of decisions of this Court which hold the activities of the Federal Government immune from state regulation or other state action.

There is no power in a state to interfere with the power of the United States to carry out the operations of Government pursuant to congressional direction. The supremacy clause of the Constitution removes all state obstacles to the performance by the Federal Government of any of its functions and so modifies "every power vested in subordinate governments, as to exempt its own operations from their own influence." *McCulloch* v. *Maryland*, 4 Wheat. 316, 427. This doctrine of federal immunity, accepted in many decisions of this Court,[14] is coextensive with the scope of federal power, for every authorized activity of the United States is an exercise of its governmental power. *Graves* v. *N. Y. el rel O'Keefe*, 306 U.S. 466, 477; *Pittman* v. *Home Owners' Corp.*, 308 U.S. 21, 32; *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 102.

This principle of federal immunity precludes the

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[14] See, *e.g.*, *Osborn* v. *United States Bank*, 9 Wheat. 738; *Thomson* v. *Pacific Railroad*, 9 Wall. 579, 590-591; *Tennessee* v. *Davis*, 100 U.S. 257, 263; *In re Neagle*, 135 U.S. 1; *Ohio* v. *Thomas*, 173 U.S. 276, 283; *Johnson* v. *Maryland*, 254 U.S. 51, 55-56; *Arizona* v. *California*, 283 U.S. 423; *Mayo* v. *United States*, 319 U.S. 441; see also, *Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania*, 318 U.S. 261.

states from interference with the property, operations, or functions of the United States. Because the United States "may perform its functions without conforming to the police regulations of a State," it may construct a dam and reservoir in a state without securing approval of its plans and specifications by the state engineer as required by state statute (*Arizona* v. *California*, 283 U.S. 423, 451); and it may operate soldiers' homes without complying with state inspection or police regulations (*Ohio* v. *Thomas*, 173 U.S. 276).[15] So, too, the driver of a mail truck for the Post Office Department cannot be required to comply with state driving license requirements (*Johnson* v. *Maryland*, 254 U.S. 51), nor may federal agents in a national forest and game preserve be subject to the hunting restrictions of the state in which the preserve is located (*Hunt* v. *United States*, 278 U.S. 96). The United States may enforce a lien for taxes upon real estate under the internal revenue laws without complying with state law requiring recordation and timely enforcement (*United States* v. *Snyder*, 149 U.S. 210); and a claim of the Government against a decedent's estate will not be barred by

[15] "Whatever jurisdiction the State may have over the place or ground where the institution is located, it can have none to interfere with the provision made by Congress for furnishing food to the inmates of the home, nor has it power to prohibit or regulate the furnishing of any article of food which is approved by the officers of the home, by the board of managers and by Congress. Under such circumstances the police power of the State has no application." *Ohio* v. *Thomas*, 173 U.S. 276, 283.

failure to file within the time required by state law. *United States* v. *Summerlin*, 310 U.S. 414. The United States may distribute fertilizer to consumers in Florida without complying with a state inspection act. *Mayo* v. *United States*, 319 U.S. 441.

The numerous cases dealing with state attempts to tax the Federal Government, its property, and its functions also establish conclusively that the states may not regulate the activities of the United States. The decisions involving a tax upon the United States, its instrumentalities, property or functions are marked by a consistent uniformity in holding that the National Government cannot be taxed by a state or local government in the absence of congressional consent. Its sovereign immunity has been given effect whether the tax was levied directly upon property owned by the United States[16]

[16] State or local taxes may not be laid upon such federally owned property as public lands prior to patent or passage of equitable title to private persons (*Colorado Company* v. *Commissioners*, 95 U.S. 259; *Northern Pacific R. R. Co.* v. *Traill County*, 115 U.S. 600; *Wisconsin Railroad Co.* v. *Price County*, 133 U.S. 496, 504; *Irwin* v. *Wright*, 258 U.S. 219), lands held in trust for Indians (*United States* v. *Rickert*, 188 U.S. 432), and even land acquired by the United States to enforce the payment of taxes (*Van Brocklin* v. *State of Tennessee*, 117 U.S. 151). Nor may lands sold by the United States to a private purchaser be re-assessed for the period of federal ownership (*Lee* v. *Osceola Imp. Dist.*, 268 U.S. 643).

or one of its instrumentalities,[17] or was imposed upon a transaction engaged in by the Government or its instrumentality.[18] These cases clearly demonstrate that the states cannot control or restrict the United States in the performance of a federal function.

The conclusion to be derived from this wealth of decisions is that "the activities of the Federal Government are free from regulation by any state" and "where, as here, the governmental action is carried on by the United States itself and Congress does not affirmatively declare its instrumentalities or property subject to regulation or taxation, the inherent freedom continues." *Mayo v. United States*, 319 U.S. 441, 445, 448. Clearly, the many agencies of the United States which hold funds of private individuals are not required to submit to the report, penalty, and investigation provisions of the Michigan statute in the absence of an unambiguous direction from Congress to do so. Here Congress has not only not so directed, but the

[17] *Clallam County* v. *United States*, 263 U.S. 341, 344 (property of wholly-owned Government corporations); *New Brunswick* v. *United States*, 276 U.S. 547 (equitable interest of wholly-owned Government corporation).

[18] The recording of a mortgage by the United States is not subject to state tax. See *Educational Films Corp.* v. *Ward*, 282 U.S. 379, 389; cf. *Federal Land Bank* v. *Crosland*, 261 U.S. 374; *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 149, 150; *Graves* v. *N. Y. ex. rel. O'Keefe*, 306 U.S. 466, 477. Equally immune are transactions of a federal instrumentality such as a national bank. *Osborn* v. *United States Bank*, 9 Wheat. 738; *McCulloch* v. *Maryland*, 4 Wheat. 316.

Comptroller of the Currency plainly has the right to refuse to divulge the reports and records here sought by the appellant. *Boske* v. *Comingore*, 177 U.S. 459; *Bank of America Nat. Trust & Sav. Ass'n* v. *Douglas*, 105 F. 2d 100, 103, 106 (C.A. D.C.)

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the appeal should be dismissed or the judgment below affirmed.

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APPENDIX A.

28 U.S.C. 1254 provides as follows:

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

* * * * * * * *

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented.

* * * * * * * *

Pertinent federal statutory provisions are as follows:

12 U.S.C. 1. Bureau of Comptroller of the Currency.

There shall be in the Department of the Treasury a bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of a national currency secured by United States bonds and, under the general supervision of the Board of Governors of the Federal Reserve System, of all Federal Reserve notes, the chief officer of which bureau shall be called the Comptroller of the Currency, and shall perform his duties under the general directions of the Secretary of the Treasury.

12 U.S.C. 2. Comptroller of the Currency; appointment; term; salary.

The Comptroller of the Currency shall be appointed by the President, by and with the advice and consent of the Senate, and shall hold his office for a term of five years unless sooner removed by the President, upon reasons to be communicated by him to the Senate; and he shall receive a salary at the rate of $15,000 a year.

12 U.S.C. 191. General grounds for appointment of receiver.

Whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in section 93 of this title, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section 192 of this title.

12 U.S.C. 192. Default in payment of circulating notes.

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.

Provided, That the comptroller may, if he deems proper, deposit any of the money or so made in any regular Government depositary, or in any State or national bank either of the city or town in which the insolvent bank was located or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit United

States bonds or other satisfactory securities with the Treasurer of the United States for the safekeeping and prompt payment of the money so deposited: *Provided,* That no security in the form of deposit of United States bonds, or otherwise, shall be required in the case of such parts of the deposits as are insured under section 264 of this title. Such depositary shall pay upon such money interest at such rate as the comptrolled may prescribe, not less, however, than 2 per centum per annum upon the average monthly amount of such deposits.

12 U.S.C. 193. Notice to present claims.

The comptroller shall, upon appointing a receiver, cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof.

12 U.S.C. 194. Dividends on adjusted claims; distribution of assets.

From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of

the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

The provisions of the Michigan Escheat Act, as amended Michigan Comp. Laws, 1929 (Mason's 1945 Supp.), are as follows:

13458-2. Definitions. Sec. 4b. The words "person" or "persons" as used in this act shall be understood and interpreted to mean and include a natural person, a copartnership, a company, an association, a bank, a trust company, a corporation, except municipal corporations, or any officer thereof, any governmental department, agency, instrumentality or official, a depository, a receiver, a trustee, a fiduciary, a debtor, a custodian, a liquidating officer, or any combination of natural persons.

The words "depositor" or "depositors" as used in this act shall be understood and interpreted to mean and include any person, or persons, as above defined, who or which is the legal or equitable owner or creditor entitled to the possession of any property, real, personal or mixed, including liquidated choses in action, which is in the possession or under the control of any other person, as above defined, who or which is indebted or accountable for any such property to such depositor.

The word "deposit" as used in this act shall be understood and interpreted to mean and include money, credits, securities, liquidated choses in action and property of any kind or nature.

The word "depository" as used in this act shall be understood and interpreted to mean and include any person, as above defined, who or which has in his or its possession or under its control any property, real, personal or mixed, including liquidated choses in action, for which he or it is indebted or accountable to any other person as depositor.

The word "escheated" as used in this act shall be understood and interpreted to refer to and included all property of whatever nature, the title to which has accrued and vested in the state by operation of any statute of this state, by reason of there being no known heirs, devisees, legatees or assignees of the last known owner.

The word "escheatable" as used in this act shall be understood to refer to and include all property of whatever kind or nature, including liquidated choses in action, over which the state has power to assume control by appropriate proceedings, by reason of its having lain dormant, unclaimed, uncalled for or abandoned as in this act provided.

* * *

13460. Same: Report by Holder to State Board of Escheats; Contents; Signature sworn to; Perjury. Sec. 6. On the thirtieth day of June in every year after the taking effect of this act, it shall be the duty of each person within this state, who or which as a depository is indebted or accountable to any other person for money, credits, securities or property of any kind to make a report as hereinafter provided.

Such report shall be made to the State Board of Escheats and shall contain a truthful statement, in detail of the following matters, viz.: First, The name of the depositor, or the name of the person in whose name any such deposit, or deposits, of any kind is held by any such person, or depository, where no dealings or transactions have been had between the depositor and the depository with respect to any money, credits, securities or property of any kind for a period of 7 years or more: Provided, however, That notice in writing to the depository by the depositor, his heirs, representatives or assigns, to keep the deposit alive, shall be construed as a transaction within the meaning of this subsection;

Second, The date of such deposit or deposits, by the depositor with the depository, or credit or credits by the depository to the depositor and whether they are in money, securities or other property, and if not in money, the nature of the same;

Third, Any interest due on such deposits, money, securities, credits or other property, if any, and the amount thereof;

Fourth, The sum total of such deposit, deposits, money, securities, credits or other property, together with interest added thereto;

Fifth, Such report, itemized as aforesaid, shall be signed by the natural person making the same and shall be sworn to before a natural person competent to administer oaths as a full, complete and truthful statement of

each of the items therein contained. If such report is made for and on behalf of a copartnership, company or association, such report may be signed and sworn to by any member of such copartnership, company or association or some person duly authorized who has knowledge of the facts. If such report is made for and on behalf of a corporation, private or municipal, such report shall be signed and sworn to by the president, vice-president, or treasurer of such corporation, and such signing and swearing to such reports shall appear to be for and on behalf of such corporation.

After the making, signing and swearing to such report as herein provided, the same shall be filed in the office of the State Board of Escheats of the state of Michigan and it shall be the duty of the secretary of said Board of Escheats to endorse or cause to be endorsed thereon the time at which such report was received and filed, which endorsement shall be signed by such secretary or some person legally competent to sign the same, and thereafter such report shall be and remain a part of the official records of the office of the State Board of Escheats.

If any false statement in such report is signed and willfully sworn to, it shall be deemed perjury on the part of the person signing and swearing to the same, and such person shall be liable to be proceeded against and punished as in other cases of perjury.

APPENDIX B.

LAW OFFICES
KELLY, KELLY & KELLY
2372 NATIONAL BANK BUILDING
DETROIT, MICHIGAN

August 15, 1946

Mr. B. C. Schram, Receiver,
First National Bank,
Fort Street,
Detroit, Michigan

In re: Estate John H. Laichinger, dec.
Attention: Mr. Regner

Dear Sir:

The writer is one of the Public Administrators for Wayne County and as such was appointed administor de bonis non of the above entitled estate.

I am advised that you have approximately $250.00 in the closed bank of the First National Bank of Detroit belonging to the above mentioned deceased. Find enclosed copy of letters of administration. Kindly forward whatever amount that is due the estate at your convenience.

Yours very truly,

By (s) L. E. KELLY,
Administrator.

TREASURY DEPARTMENT
COMPTROLLER OF THE CURRENCY

October 16, 1946.

Kelly, Kelly & Kelly,
Attorneys at Law,
2372 National Bank Building,
Detroit 26, Michigan.
Attention: Mr. L. E. Kelly.

In reply, please refer to: DD-27
Claim No. 30-10932
First National Bank—Detroit
Detroit, Michigan.

Gentlemen:

Your Ref: Estate John H. Laichinger, deceased

Receipt is acknowledged of your letter of August 15, 1946 addressed to Mr. B. C. Schram, Receiver, First National Bank, Fort Street, Detroit, Michigan, and to the reply of the Detroit Representative of this office dated August 19, 1946, concerning your appointment as administrator de bonis non in the matter of the Estate of John H. Laichinger, deceased. With your letter you enclosed a certified copy of your letters of administration.

We hold in our files checks in payment of the fourth, fifth, and sixth (final) interest dividends on Claim No. 30-10932, drawn to the order of John H. Laichinger or Margaret Laichinger, in the aggregate amount of $257.89. Before making payment of these dividends, it is desired that we be

furnished with certified copies of the death certificates of the claimants.

Very truly yours,

(s) G. W. GARWOOD,
Supervising Receiver,
Division of Insolvent National Banks.

TREASURY DEPARTMENT
COMPTROLLER OF THE CURRENCY

November 21, 1946.

Kelly, Kelly & Kelly,
2372 National Bank Building,
Detroit 26, Michigan.

Reference: Est. John H.
Laichinger, dec.

Attention Mr. L. E. Kelly.

In reply, please refer to: DD-27
Claim No. 30-10932
First National Bank—Detroit
Detroit, Michigan.

Gentlemen:

The enclosed checks, listed below, are forwarded you in payment of dividends on the claim mentioned above.

Check Number	Dividend	Amount
U.D. Q-270,256	Fourth	$ 68.65
U.D. Q-270,257	Fifth	137.31
U.D. Q-270,258	Sixth (final)	51.93
	Interest	

Payee:

Lawrence Kelly, a Public Administrator, de bonis non of the estate of John H. Laichinger, deceased.

Very truly yours,

(s) G. W. GARWOOD,
Supervising Receiver,
Division of Insolvent National Banks.

Enclosures (3)

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